

Jurisdictions

*A Report of the
Law, Justice, and Indian Affairs Interim Committee*

November 2000

Prepared by

Montana Legislative Services Division
P.O. Box 201706
Helena, MT 59620-1706



(406) 444-3064
FAX: (406) 444-3036

Internet URL: <<http://www.mt.gov/leg/branch/branch.htm>>

LAW, JUSTICE, AND INDIAN AFFAIRS COMMITTEE
MEMBERSHIP

Senator Lorents Grosfield, Presiding Officer
Representative Carol Juneau, Vice Presiding Officer

Senator Sue Bartlett	Representative Gary Matthews
Senator John Bohlinger	Representative Dan McGee
Senator Duane Grimes	Representative Jay Stovall
Senator Mike Halligan	Representative Jim Shockley
Senator Linda Nelson	Representative Gail Gutsche

COMMITTEE STAFF

Leanne Kurtz, Legislative Research Analyst
Valencia Lane, Attorney
Lois O'Connor, Secretary

Published by:

Montana Legislative Council
Representative William "Red" Menahan, Presiding Officer
Senator Tom Beck, Vice Presiding Officer

Montana Legislative Services Division
Robert B. Person, Executive Director
David D. Bohyer, Director, Office of Research and Policy Analysis
Gregory J. Petesch, Director, Legal Services

TABLE OF CONTENTS

INTRODUCTION	i
The Committee's Charge	ii
Meetings and Activities	iii
The Final Report	iv
 PART A: CORRECTIONS, JUSTICE, AND THE COURTS	
The Interim in Review	
Court Liaison Activities	A-1
District Judges	A-1
Supreme Court	A-1
Interbranch Relations in Other States	A-3
Intermediate Appellate Court	A-5
The Future of the Court Liaison Function	A-6
The Department of Corrections	A-6
Women's Prison Study	A-7
Modified FTEs	A-7
Automation Projects	A-8
Board of Pardons and Parole	A-8
The Pre-Sentence Investigation	A-10
Rethinking Probation and Parole	A-11
Executive Planning Process	A-12
The Future of the LJIAC-DOC Relationship	A-12
Department of Justice	A-13
 House Joint Resolution No. 37 Study of Women's Prison Issues	
Introduction	A-19
Chapter 1: Study Plan and Committee Activities	A-21
Chapter 2: Background	A-25
Chapter 3: Native American Women Incarcerated	A-29
Chapter 4: Committee Goals, Findings, and Recommendations	A-35
Statistical Demographic Information (Who is incarcerated in Montana's correctional system for women?)	A-35
Women in Shelby and MWP Expansion	A-40
Classification	A-42
Programming	A-47
Education/Training/Vocational Education	A-52
Access to the Board of Pardons and Parole	A-54

Mental Health	A-55
Drug Use	A-56
Spiritual Needs and Religious Activity	A-58
General Effectiveness of the System	A-60
Chapter 5: Release	A-66
Conclusion	A-67

**Senate Joint Resolution No. 14 Study of Sentencing Statutes,
Data Information Collection and Management, and
Related Issues**

	A-69
Introduction	A-69
Study Plan and LJAC Activities	A-73
Correctional and sentencing policy	A-73
Criminal justice data	A-74
Statutory analysis	A-76
Postsentencing issues	A-77
The issue of resources	A-78
LJAC Sentencing Study Recommendations	A-79
Work Products	A-83
Judiciary Committee Title 45 Felony Sentencing Statutes Analysis Tool and Reference Guide	A-84
Judiciary Committee Title 45 Sentencing Statutes Analysis Tool	A-87
Title 45 Felony Sentencing Statutes Reference Guide	A-92
Felony Offenses Not Included by Sentencing Commission or Enacted Since 1995	A-105
Title 45 Felony Drug Offenses	A-106
Felony Offenses Outside of Title 45	A-107
Misdemeanors That May Rise to Level of Felony Upon Second or Subsequent Offense	A-112

PART B: STATE-TRIBAL RELATIONS

The Interim in Review

Crow Tribe-Montana Water Rights Compact	B-1
Committee's Introduction to the Tribes	B-1
Human Skeletal Remains and Burial Site Protection Act -- Repatriation	B-2
State-Tribal Economic Development Commission	B-4
The Blackfeet Reservation	B-7

**House Joint Resolution No. 12 Study of a Commission on Indian
Affairs**

Introduction	B-11
------------------------	------

What Makes for a Successful Indian Affairs Commission?	B-15
How Do Indian Affairs Commissions in Other States Operate?	B-19
Do Tribal Governments Believe That the Montana Legislature Should Create a Commission on Indian Affairs?	B-22
Do State Agencies Believe That the Legislature Should Create a Commission on Indian Affairs?	B-26
Conclusion and Recommendation	B-27

PART C: SUMMARY OF RECOMMENDATIONS

Bills by Request of the Law, Justice, and Indian Affairs Committee	C-1
Committee Recommendations	C-3
CONCLUSION	C-7

INTRODUCTION

Jurisdiction, n. 1. *The right, power, or authority to administer justice by hearing and determining controversies.* 2. *power; authority; control.* 3. *the extent or range of judicial, law-enforcement, or other authority.* 4. *the territory over which authority is exercised.*

--Random House Webster's College Dictionary,
Deluxe Edition

When the 1999-2000 interim began, observers misconstrued the purpose of the new Law, Justice, and Indian Affairs Committee (LJIAC or Committee). Was it to be a committee devoted to Indians in the justice system? Was its charge to review laws that affect the tribes? What did the first two components, Law and Justice, have to do with the third component, Indian Affairs?

Law, Justice, and . . . Indian Affairs?

The answers lie in the reorganization of the interim committee structure and in the concept of jurisdiction. When the 1999 Legislature enacted Senate Bill No. 11 (SB 11), interim committees were consolidated and made permanent, and membership was drawn from specific session standing committees. SB 11 repealed the statute that enabled the Committee on Indian Affairs and placed the responsibility to provide a forum for state-tribal relations with the LJIAC. While the Legislature was considering SB 11, the Coordinator of Indian Affairs was circulating a proposal to create a Commission on Indian Affairs that would be attached to the Executive Branch. The repeal of the Committee on Indian Affairs was intended as a trial measure in light of the possibility that a Commission would be created.¹

The LJIAC became the committee to assume Indian affairs responsibilities because many of the problems affecting state-tribal

¹See Part B for a complete discussion of the Commission on Indian Affairs proposal.

relations are jurisdictional in nature and in a legislative session would likely be addressed by the House and Senate Judiciary Committees. The membership of the LJAC is drawn from those session committees.

It is considerably more obvious why an interim committee composed of House and Senate Judiciary Committee members would take up issues affecting the Departments of Corrections and Justice and the state's court system, all entities with distinct jurisdictions in the State of Montana.

The Committee's Charge

The LJAC's assigned duties for the 1999-2000 interim fell into three general categories: responsibilities assigned to each interim committee; the completion of three interim studies contained in joint resolutions and assigned to the Committee by the Legislative Council; and the fulfillment of the Committee's specific statutory mandate.

Section 5-5-215, MCA, provides that each interim committee shall:

1. review administrative rules within its jurisdiction;
The LJAC has administrative rule review responsibilities for the Departments of Corrections and Justice.
2. conduct interim studies as assigned;
The Legislative Council assigned three studies to the LJAC.
SJR 14 - a study of sentencing statutes and data;
HJR 12 - a study of a proposed Commission on Indian Affairs; and
HJR 37 - a study of women's prison issues.
3. monitor the operation of assigned Executive Branch agencies, with specific attention to the following:

- (a) identification of issues likely to require future legislative attention;
- (b) opportunities to improve existing law through the analysis of problems experienced with the application of the law by an agency; and
- (c) experiences of the state's citizens with the operation of an agency that may be amenable to improvement through legislative action; and

Agencies assigned to the LJAC are the Departments of Corrections and Justice.

- 4. prepare bills and resolutions that, in its opinion, the welfare of the state may require for presentation to the next regular session of the Legislature.

The LJAC requested several bills to present to the 2001 Legislature. A brief description of each bill is included in Part C of this report.

Section 5-5-226, MCA, provides that the LJAC:

- 1. has administrative rule review, program evaluation, and monitoring functions for the Department of Corrections and the Department of Justice and the entities attached to the Departments for administrative purposes;
- 2. shall act as a liaison with the judiciary; and
- 3. shall act as a liaison and forum for state and tribal relations.

The LJAC is a unique interim committee. In addition to the duties that it assigned to all of the committees, SB 11 designated the LJAC as the Legislative Branch's liaison with the Judicial Branch--an unprecedented

official relationship between these two branches of Montana state government. The LJIAC was also designated as the Legislature's liaison with Montana's tribal nations, maintaining the formal government-to-government links that had been the responsibility of the Committee on Indian Affairs.

Meetings and Activities²

The LJIAC held seven regular meetings around the state during the 1999-2000 interim. In addition, members participated in public hearings at Crow Agency and in Billings for the Crow Tribe-Montana Water Rights Compact (Compact) in May 1999. In June 2000, the Committee formed subcommittees, each of which met once during July and August 2000.

- | | |
|-----------------|---|
| April 1999: | The LJIAC held a brief meeting before adjournment of the 1999 Legislative Session to elect officers and discuss its general direction for the upcoming interim. |
| May 1999: | The LJIAC joined a subcommittee of the Environmental Quality Council in holding public hearings at Crow Agency and in Billings to discuss the Compact. |
| September 1999: | The LJIAC held a 1½ day meeting on the campus of the Montana Women's Prison and at the Sheraton Hotel in Billings. |
| November 1999: | The LJIAC met for 1½ days in Missoula. |
| December 1999: | The LJIAC met in the Supreme Court's |

²Complete meeting agendas, minutes, attendee sign-in sheets, and exhibits are all available at the Montana Legislative Services Division office. Committee minutes and reports are also available on the Committee's Internet website at < http://leg.mt.gov/Interim_Committees/LAW_JUSTICE > .

courtroom in Helena.


February 2000: The LJAC met for 2 days in Helena.

April 2000: The LJAC met 1 day on the Blackfeet Reservation in Browning and 1 day on the campus of the Crossroads Correctional Center in Shelby.

July-August 2000: Corrections/Courts, Sentencing, and Indian Affairs Subcommittees met.

August 2000: The LJAC held a 2-day meeting--its final meeting of the interim--in Helena.

The Final Report

This document is organized to reflect the distinct responsibilities of the LJAC. The main body is divided into three parts: Corrections, Justice, and the Courts (Part A); State-Tribal Relations (Part B); and a summary of Committee recommendations (Part C). The pagination reflects the three parts. Parts A and B are divided further into the numerous topics that the Committee explored during the interim. Final reports resulting from the studies on women's prison and sentencing issues are included at the end of Part A, and the final report resulting from the study of a Commission on Indian Affairs is included at the end of Part B. Committee recommendations appear throughout this document in shadowed boxes like the graphic  to the right.

PART A

CORRECTIONS, JUSTICE, AND THE COURTS

The Interim in Review

**Topics Considered,
Fulfilling the Committee's Statutory Obligations**

Court Liaison Activities

" *The [Law, Justice, and Indian Affairs] committee shall act as a liaison with the judiciary . . .*", reads a portion of section 28, Chapter 19, Laws of 1999. This new provision of law imparted on the LJAC carries significant responsibility and presents some extraordinary opportunities that have not previously been before the Legislative or Judicial Branches of Montana's state government.

District Judges

The LJAC took a first step in fulfilling this liaison function in August 1999 by sending a letter to all of the state's District Court Judges (Appendix A), informing them of the changes in the law and the opportunities that this change presents. Through the letter, the Committee also invited the judges to attend LJAC meetings and discuss with the Committee any matters of mutual concern to the Legislative and Judicial Branches. The letter suggested that possible items for discussion may include caseloads, types of cases that judges are seeing, problems that might be remedied through legislation, and District Court budgets. Unfortunately, the Committee did not see much participation as a result of this outreach, with only one judge responding. Judge Russell Fagg, Thirteenth Judicial District, spoke to members during the Committee's September 1999 meeting in Billings. This type of outreach will continue in future interims, however, and perhaps as the Committee gains more exposure, time set aside for discussion with District Judges will prove fruitful to both the Legislature and the judiciary.

Supreme Court

In the spirit of this new interbranch relationship and the potential that it promises, Chief Justice Jean Turnage offered the Committee the use of the Supreme Court's courtroom for its December 10 1999 meeting.³ This meeting marked the first time that a legislative committee has held

³See the December 10, 1999, minutes of the LJAC's meeting, maintained by the Legislative Services Division, for more details.

formal proceedings in the chamber on the fourth floor of the Justice Building.

The Code Commissioner discussed with the Committee the separation of powers doctrine⁴ provided for in Article III, section 1, of the Montana Constitution. Specifically, the Constitution provides:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

On its face, the separation of powers doctrine appears simple and straightforward--the "checks and balances" stuff of 8th grade civics lessons. In practice, however, the lines are not so clearly drawn, a fact made evident by the number of court cases that have dealt with this basic tenet over time. The LJAC learned that the Constitution limits the Legislature's authority; it does not grant specific rights to the Legislative Branch. The

(1) The Supreme Court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.

(2) It has general supervisory control over all other courts.

(3) It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

(4) Supreme Court process shall extend to all parts of the state.

⁴See Exhibit #1 included in the December 10, 1999, minutes for the full text of the separation of powers overview that was provided to Committee members.

Legislature is permitted under the Constitution to act in any area that is not constitutionally restricted, while the judiciary is limited to acting only on the particular matters brought before it. The root of most conflict between the Legislative and Judicial Branches, the Committee was told, lies in the Judicial Branch's determination of the constitutionality of law created by the legislative body.

Although tension among the three branches of government is a natural and necessary function of this system of government, the liaison function of the LJAC, deliberately and thoughtfully included in SB 11, has the potential to minimize conflict through educating legislators and judges alike in the distinct responsibilities of each and through establishing formal lines of communication that may deflect conflict down the road.

Interbranch Relations in Other States

Montana is not the first state to devise ways of improving communication between the Legislative and Judicial Branches. Arizona, Colorado, Rhode Island, and Wisconsin are among states that have established boards and task forces to address separation of powers issues. A report prepared by the National Center for State Courts discusses a 33-member commission in Wisconsin that is charged with researching the separation of powers doctrine and "exploring ways for courts to simultaneously maintain independence and cooperate with other branches of government for the common good". The commission provided a series of recommendations to improve formal interbranch communications, some of which are already in use in Montana and some of which, made possible by the creation of the LJAC, may warrant serious consideration. The Wisconsin recommendations include:

- < an annual state of the judiciary speech to the Legislative and Executive Branches;

- < orientation materials for new judges and legislators about the Legislative and Judicial Branches;
- < implementation of a "judicial ride-along" program that provides legislators an opportunity to learn about the courts from judges and court officials;
- < interbranch conferences;
- < interbranch task teams and committees;
- < informal interbranch communications; and
- < institutional procedures, such as judicial checklists and judicial impact statements and reports to minimize potential problems related to executive or legislative initiatives.

A court accountability subcommittee in Wisconsin also produced a report with recommendations aimed at improving court performance, conduct, and effectiveness and improving the public's understanding of the Judicial Branch and its relationship to the other two branches of Wisconsin's state government.

In addressing a board meeting of the Council of State Governments-West, California Courts Chief Administrator and Vice Chair of the National Center for State Courts Board of Directors, William C. Vickrey, discussed opportunities for cooperation among courts and legislatures. Vickrey's message was that "courts can no longer remain isolated and will have to seek greater cooperation with legislatures"⁵ to meet the new challenges of changing technology, expanding numbers of cases involving families and children and drugs, and changing "public

⁵Carl Bianchi. "Courts and Legislatures: Time for Cooperation?" *Western Legislatures*, Summer 2000. p. 9.

expectations of courts and expectations of judicial fairness". Referring to child abuse and neglect cases, Vickrey also stressed that "[c]ourts and legislatures will have to cooperate to keep children from languishing in dependency and achieve permanent placements more quickly".⁶ One way to facilitate enhanced interbranch relationships, Vickrey suggested, was for Western states to form teams of leaders from all three branches of government "to meet and build new foundations of cooperation . . .". One might view the LJAC as the Montana Legislature's membership on such a team.

The LJAC has at its disposal numerous other examples of state initiatives to improve interbranch relations. The Committee also now has the benefit of permanency to explore the various strategies over the next several interims. In addition, the State Bar of Montana is planning a "Law School for Legislators", a portion of which will include discussions on the judiciary and its relationship with the Legislature.

Intermediate Appellate Court

Also during the December 10 meeting, Chief Justice Turnage requested that the Committee consider directing staff to draft a bill establishing an intermediate court of appeals. In personal testimony and in a letter to the Committee (Appendix B), Chief Justice Turnage stated:

[b]ecause of the Supreme Court's increasing case load and the concomitantly lengthier times that cases remain pending on appeal before decisions can be handed down, and, in order to preserve Montanans' right of meaningful access to the courts and the right of speedy and efficient justice guaranteed under Article II, Section 16 of the Constitution, the Court believes it again appropriate to seek creation of an intermediate appellate court by the 2001 legislature.

⁶Ibid.

Senate Bill No. 443, introduced by Senator Halligan during the 1999 Session, called for the creation of such a court, but the bill, having been re-referred from the Senate Judiciary Committee to the Senate Finance and Claims Committee, failed to reach the Senate floor. The bill's fiscal note indicated that the court would cost \$2.4 million a biennium.

Justice James Nelson has been leading the Court's efforts to convince members of the State Bar and the LJAC that the time has come for an intermediate appellate court in Montana. "An intermediate appellate court

. . . will go a long way toward resolving what is, at present, a pressing problem, but which will, in the next few years, become a full-blown crisis," writes Nelson for the February 2000 edition of *The Montana Lawyer*. Nelson continues, "an intermediate appellate court will give the Supreme Court the flexibility to balance its increasing caseload between the two courts and to allow the justices to spend more time--as they should--researching, discussing and deciding the important, difficult and precedent-setting cases that the Court is increasingly dealing with".

Justice Nelson appeared before the LJAC at the Committee's final meeting of the interim, on September 24, 2000, to testify to the merits of an intermediate court of appeals.

The LJAC believes that the Legislature should debate the merits of an intermediate appellate court and requests that a bill (LC 0102) be drafted

The Future of the Court Liaison Function

The LJAC had dozens of significant items to address during the first interim of its existence, many of which overshadowed this unique new role for a legislative committee. The experience and institutional memory that will be developed as the LJAC continues from interim to interim

should serve both the Legislative and Judicial Branches well as they step into this exciting new arena--a permanent forum for ideas and discussion between branches for the betterment of the state.

The Department of Corrections

As staff to one of the agencies assigned to the LJAC under section 5-5-226, MCA,

representatives of the Department of Corrections (DOC or Department) were regular fixtures at the LJAC's meetings. In August 1999, DOC Director Rick Day received an

The Department of Corrections is made up of the following divisions and programs:

Professional Services Division
Administrative Services Division
Community Corrections
Montana State Prison
Montana Women's Prison
Montana Correctional Enterprises
Pine Hills Youth Correctional Facility

Entities administratively attached to the Department of Corrections:

introductory letter

(Appendix C) explaining the new interim committee structure and describing ways that the Committee might fulfill its responsibilities. What follows are some highlights--not intended to be all-inclusive--of the Committee's interactions with the Department.

Women's Prison Study

The DOC staff provided much of the information for the House Joint Resolution No. 37 study of women's prison issues and arranged for the Committee's tour of the Montana Women's Prison in September 1999.⁷

Modified FTEs

The 1999 Legislature eliminated funding for 31 FTEs (full-time equivalent positions) from Montana State Prison's (MSP) base budget. In October 1999, the Department requested approval and funding from the

⁷The HJR 37 study report appears later in Part A.

Governor's Office to create 31 modified⁸ FTEs at MSP and 28 modified FTEs for the Probation and Parole Program. Information provided to the Legislative Finance Committee and to the LJAC in October and November 1999 summarized the problem as follows.

Montana State Prison is faced with mandatory overtime and no security staffing in key areas. Probation and Parole is faced with its largest annual % of increase in offenders on supervision in our communities in the last four years adding more than 350 offenders during FY99.

The DOC estimated that the positions would cost nearly \$4 million biennially. The Governor approved the DOC's plan to partially fund these positions through the 1999 Legislature's \$1 million appropriation from the general fund to the Governor's Office of Budget and Program Planning for a vacancy savings and emergency contingency account. That account, along with vacancy savings and an appropriation for adult contract beds, provided the dollars necessary to fill and fund these positions.

The DOC presented the LJAC with initial information regarding modified FTEs at the Committee's November 1999 meeting. In July 2000, the DOC told the Corrections/Courts Subcommittee that 27 of the authorized 28 Probation and Parole Bureau positions had been filled. At the Committee's final meeting in August 2000, MSP warden Mike Mahoney informed the Committee that 29 of the 31 positions created for the prison had been filled and that he expected the remaining two positions to be filled by mid-September.

Automation Projects

Several hours of Committee discussion during the 1999-2000 interim

⁸Although these positions and those in community corrections can be filled by the DOC, the 2001 Legislature must review and approve them as part of the DOC's budget.

centered around criminal justice and corrections data. The DOC and other users of corrections data have long relied upon the Adult Correctional Information System (ACIS) to provide basic information on the inmates under the supervision of the Department. The ACIS was used primarily as an inmate tracking device--a way for the Department to record inmate movement and physical characteristics. The growing demand for statistical analyses brought about the need to improve corrections data systems and to integrate them with data systems maintained by the courts, the Department of Justice, and the Department of Public Health and Human Services.

To this end, the DOC has been developing PROFiles (Programmed Reporting of Offender Files) and provided the LJAC with a detailed demonstration of the first phase of this project at the Committee's final meeting.⁹

Board of Pardons and Parole

Section 2-15-2302, MCA, provides for a Board of Pardons and Parole and attaches the Board to the DOC for administrative purposes only. The Board is a quasi-judicial entity as provided in section 2-15-124, MCA. The Board's Internet website (<http://www2.mt.gov/bopp>) provides the following introductory information.

Parole is the release of an inmate into the community prior to the completion of sentence subject to the orders of the Board of Pardons and Parole and the supervision of the Department of Corrections. The Parole Board is an independent agency and exercises its quasi-judicial and policy-making functions without the approval or control of the Department of Corrections. The Board acts somewhat like a Judge when making parole decisions and generally does so without review. The primary concern of the

⁹A discussion of ProFiles and other data systems and Committee recommendations regarding data is part of the SJR 14 sentencing study report appearing later in this document.

Board is the protection of the public. It is also important to note the Board members are not state employees, but are appointed by the Governor and confirmed by the Senate. They do not receive a salary but are reimbursed for expenses.

The Board's Executive Director, Craig Thomas, appeared before the LJAC at its November 1999 meeting in Missoula to provide information on the Board's caseloads, parole eligibility, parole release and release locations, parole violations, and alternative placement. Additional details about the Board furnished to the Committee are excerpted from the meeting minutes as follows:

The Board is currently responsible for executive clemency that includes pardon (total forgiveness by the state for an offense), commutation of sentence (substitution of a lesser sentence for a greater sentence), and parole revocation and release and setting parole conditions.

The primary objectives of the Board are to carefully review each eligible prisoner nearing the end of a period of incarceration set by the Court and the Legislature; to make every feasible effort to bring about the rehabilitation of offenders incarcerated and demand that offenders prove that they no longer present a risk to the communities; and to allow victims to present a statement concerning the impacts of the crime on the victims and the victims' families, and whether the offender should be released into the community.

The Board also: sets specific conditions prior to release (appropriate treatment); sets conditions of actual parole; returns to custody an offender who is unable to adjust to close supervision or who violates any condition of release; has the authority to conditionally discharge an offender from supervision;

and has the ability to relieve the offender of the responsibility of paying a supervision fee.

The Board's expense reimbursement is \$15,000 annually and its total budget is in excess of \$380,000 for operating expenses, personal services, and a staff of seven. The Board is made up of part-time volunteer citizens who are paid a \$50 per day stipend for each day they conduct Board business.

The Pre-Sentence Investigation

In February 2000 Committee members learned of the kind of information that is collected by probation and parole officers when they complete offender Pre-Sentence Investigations (PSIs).¹⁰ The members were told that PSIs serve as the foundation for sentencing in District Courts and that most judges end up concurring with the sentencing recommendations provided by the officer completing the form.

Montana law does not, however, require that a PSI be conducted; rather, the procedure takes place at the judge's discretion. Section 46-18-111, MCA, provides that "The court shall order a presentence report unless the court makes a finding that a report is unnecessary." Currently, District Judges order PSIs in about 70% of the state's felony cases. Section 46-18-112, MCA, specifies the content required in a PSI. The complete text of this section is as follows:

46-18-112. Content of presentence investigation report. (1)

Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

- (a) the defendant's characteristics, circumstances, needs, and potentialities;
- (b) the defendant's criminal record and social history;

¹⁰See Exhibit #10 in the February 13 and 14 minutes of the LJAC, maintained by the Legislative Services Division, for the sample PSI that was discussed.

(c) the circumstances of the offense;
(d) the time of the defendant's detention for the offenses charged;

(e) the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community; and

(f) the victim's pecuniary loss, if any. The officer shall make a reasonable effort to confer with the victim to ascertain whether the victim has sustained a pecuniary loss. If the victim is not available or declines to confer, the officer shall record that information in the report.

(2) All local and state mental and correctional institutions, courts, and law enforcement agencies shall furnish, upon request of the officer preparing a presentence investigation, the defendant's criminal record and other relevant information.

(3) The court may, in its discretion, require that the presentence investigation report include a physical and mental examination of the defendant.

Rethinking Probation and Parole

The DOC's Community Corrections Division presented "Rethinking Probation and Parole"--a relatively new way of approaching community corrections--at the LJAC's February meeting. Following an overview of the state's probation and parole system, DOC staff told the Committee that probation and parole officer caseloads had been averaging 89 adult offenders an officer, compared to caseloads of 70 an officer in surrounding states. It was noted that in 1999, there was a 6.55% growth rate in the adult offender population supervised through community corrections.

The new approach focuses on changing offender supervision policies to provide additional contact between offenders and officers outside of the traditional office setting. With new policies in place and with the 28

modified positions filled, officers will have increased contact with offenders in their homes, with offenders' families, and in offenders' places of employment. The Probation and Parole Bureau is also looking at modifying officer work schedules to put officers in the community during evening and morning hours, and more time will be made available for victims' services. In addition, some officers will receive special sex offender and chemical dependency training. The Committee was given an overview of the Probation and Parole Bureau's new Offender Case Management and Supervision Standards policy.¹¹

Executive Planning Process

In April, the DOC reviewed with Committee members the agency's Executive Planning Process (EPP) proposals for the 2003 biennium. Beginning with the 1999-2000 interim, interim committees all have Executive Branch agencies "assigned" to them for the purposes of program review and general Executive Branch-Legislative Branch relations. The LJAC recognized that reviewing the DOC's initial EPP proposals under this new interim structure could be of significant benefit to both the agency and the Legislature, giving a group of legislators a headstart in becoming familiar with the items likely to surface during the 2001 Session. The Committee understood that the proposals that they reviewed in April were subject to change because they had not yet been examined by the Governor's Office. Although the primary focus of an EPP proposal is funding, the information given to the LJAC during that exercise also provided detail about some of the DOC's programs and anticipated challenges--an education that should serve returning members well as they grapple with corrections proposals during the session.

The Future of the LJAC-DOC Relationship

Because the LJAC is now in statute and, absent future legislative

¹¹See Exhibit #14, included in the February 13 and 14 LJAC minutes.

action, will exist in perpetuity, the Committee and the DOC have an opportunity to continue and perhaps expand on the work begun by the two entities this interim.

Department of Justice

Attorney General Joe Mazurek received a letter (Appendix D) similar to that received by DOC Director Day in August 1999, introducing him to the Committee and its statutory duty to interact with the Department of Justice (DOJ). At the Committee's November meeting, Steve Bullock, Executive Assistant Attorney General, and JanDee May, DOJ Central Services Division Administrator, discussed the DOJ's responses to the questions posed in the Committee's August letter. Following is the text of the questions and a summary of the DOJ's responses.

The DOJ is made up of the following divisions and programs.

Attorney General's Office
Legal Services Division
Crime Control Division/Board of Crime Control
Division of Criminal Investigation
Forensic Sciences Division
Gambling Control Division
Highway Patrol Division
Justice Information Systems Division
Law Enforcement Academy Division
Motor Vehicle Division
Natural Resource Damage Program (ARCO Litigation)

Entities administratively attached to the DOJ are:

Workers' Compensation Fraud Office (2-15-2015, MCA)
Gaming Advisory Council

1. *Do you foresee any issues or problems (budgetary or otherwise) within your Department that the 2001 Legislature may be dealing with?*
 - < The DOJ is being adversely affected by the growing market demand for information technology (IT) personnel. Staff specifically mentioned the high rate of turnover; IT positions remaining vacant for longer periods of time; the need for additional resources to recruit, select, and train new IT employees; the workload shifting to experienced employees while new employees are being trained; and general increased workload stress at all levels of the

agency.

- < Because of the transition to the state's new Accounting, Budgeting, and Human Resources System (SABHRS), the DOJ Central Services Division has had to hire additional employees to meet payroll deadlines and make vendor payments.
- < The DOJ is exploring implementing document imaging technology in the Motor Vehicle Division. Staff noted that in 1996, the Division processed 1 million vehicle registrations, and by 1997, 1 million registrations had been processed by the end of the third quarter. Imaging would replace current microfilming technology that has become inefficient and costly.

2. *Are there specific laws that your Department is consistently having trouble complying with or enforcing? Is the absence of a law in a particular area causing problems?*

- < The federal Volunteers for Children Act, passed by Congress in 1998, permits entities to request national fingerprint background checks on individuals who care for children, the elderly, and the disabled. The DOJ told the Committee that "Legislative direction to the Department in setting the procedural and implementation guidelines for non-criminal justice background checks would be extremely beneficial."
- < There are statutes that give the DOJ responsibilities that the agency is unable to fulfill because it lacks the resources

to do so. To comply with House Bill No. 64,¹² passed in 1999, the DOJ will be identifying the low-priority services and their budgetary impacts. The DOJ anticipates that this process will help to clarify statutory requirements that the agency is unable to comply with because of insufficient resources.

- < The DOJ has encountered some problems attributed to lack of legislative guidance in driver licensing of individuals with perceived disabilities. Most states have medical review panels to make licensing decisions regarding drivers with disabilities--Montana has no such panel, and without one, the DOJ anticipates increasing problems associated with licensing drivers with disabilities.
- < The DOJ anticipates that legislation implementing graduated driver licensing will again be proposed in the 2001 Session. (Attempts to establish graduated licensing failed in the 1999 Session.) The program is designed to improve highway safety by progressively developing and improving the skills of young, inexperienced drivers.
- < The DOJ told the Committee that the Highway Patrol is having difficulty with section 61-8-908, MCA, requiring the Patrol to use a rotation system among qualified tow truck operators when summoning a tow truck to the scene of an accident. Specifically, an absence of a uniform rate base for tow truck operators leaves the Highway Patrol open to accusations that it is "supporting and endorsing rates that are, in the eyes of the motorist, unreasonable".¹³ Another

¹²HB 64 requires agencies to submit a separate budget that represents 85% of their current base budget.

¹³Page 2, Exhibit #21, LJAC minutes, November 18 and 19, 1999.

problem that the Patrol is encountering is that tow truck operators are filing complaints that they are not getting fair area access for rotation calls.

3. *Are there successes that your Department or its programs have achieved that the Committee should know about? Are there successes that the Department will need legislative assistance to build upon?*

< The DOJ listed the \$215 million settlement of the state's 15-year-old lawsuit against the Atlantic Richfield Co. (ARCO) for damages to the Clark Fork River Basin; the tobacco settlement reached in November 1998 from which Montana will receive \$832 million over the next 26 years and the additional \$90 million awarded to Montana in recognition of the state's successful case against the tobacco companies; the Crow coal case, in which the U.S. Supreme Court agreed with the state in its argument that "the tribe itself did not pay the taxes and thus should not be entitled to be compensated for the [coal severance] taxes collected from [a] private firm" mining on land owned by the tribe;¹⁴ successful negotiation of water rights compacts with the National Park Service, the Northern Cheyenne Tribe, and the Crow Tribe; completion of the Criminal Justice Messaging and Information System that meets federal requirements for system interfaces and maintains Montana's access to national criminal justice databases; Y2K compliance; and introduction of electronic fingerprinting technology.

4. *How have actions taken by the 1999 Legislature affected your*

¹⁴Page 2, Exhibit #21, LJAC minutes, November 18 and 19, 1999.

Department and its functionality (positively or negatively)? Do these actions need to be reconsidered in 2001? Why?

- < Legislation and funding positively affecting the DOJ include: support for moving the Forensic Sciences Laboratory from St. Patrick Hospital in Missoula to a new location in Missoula designed to be a forensic sciences laboratory; implementation of a numerical speed limit; the Protective Services Pay Plan that has helped the Highway Patrol retain its qualified officers; approval of funding for attorneys and support staff to assist local County Attorneys in prosecuting child abuse and neglect cases; authorization of a voluntary automated accounting and reporting system for video gambling machines; support allowing the DOJ to hire a coordinator for the Sexual and Violent Offender Registry; support for updating the Criminal Justice Information System; and passage of House Bill No. 106, allowing Montana to enter into National Crime Prevention and Policy Compact agreements to receive criminal history records for purposes other than criminal justice.

The DOJ staff explained the function of many of the Department's programs by describing how the various programs were employed in an actual criminal investigation. At the conclusion of the DOJ's presentation, interested Committee members toured the new Forensic Sciences Laboratory.

STUDIES ASSIGNED TO THE COMMITTEE

HOUSE JOINT RESOLUTION NO. 37

SENATE JOINT RESOLUTION NO. 14

House Joint Resolution No. 37
Study of Women's Prison Issues
Prepared by
Leanne Kurtz_____

INTRODUCTION

Most of us try not to think of prison. The word invokes unpleasant images that have been played over and over in popular culture. Most of us have never been to or done time in prison, so what we see in movies and on television serves as our only picture of what life behind bars is like. Those images are enough to convince most of us that prison is not a place to aspire to go. So it surprised no one when on the third day of her "incarceration" at North Carolina's Davidson County Jail, *Inside Edition* anchor Deborah

Norville wrote, "I think this is the worst day I have a kind of dull ache in my head. My neck is stiff You can tell this will be a bad day." After a brief description of the

Nationally, the population of female inmates incarcerated in state prisons grew from 39,054 in 1990 to 75,241 in 1998, an 8.5% average annual change. (United States Department of Justice, Bureau of Justice Statistics Bulletin, August 1999)

In Montana, the female inmate population grew from 76 in 1990 to 248 in 1998, a 15% average annual change. (United States Department of Justice, Bureau of Justice Statistics Bulletin, August

grits served for breakfast, she concluded, "I can feel I'm getting edgy. This 'grand experiment' has started to wear thin. I just want to get this over with." Billed as a "rare and unflinching look at day to day life behind bars", the news magazine's video diary recorded Norville's 5 days at the jail, stripped of her makeup, her underwire bra, and her news anchor business suits. The president of the syndicate that owns *Inside Edition* explained that Norville's feature was intended to "demonstrate the jarring effects of losing one's freedom".

Despite its dramatic, made-for-tv nature and Norville's relatively short length of stay, the series of reports did manage to convey to viewers whose only experience with prison had been watching "Escape From Alcatraz" a virtual glimpse of a woman's experience living in captivity. As is the case with most television news pieces, however, time and the audience's attention span were limited, so the video diary failed to provide a thorough examination of women in prison, how their needs and experiences differ from their male counterparts, and why so many more women than ever before are going to prison.

These difficult questions are being analyzed by corrections professionals, sociologists, former inmates, and inmates' relatives nationwide, not to mention the federal Department of Justice, with its ample resources. Recognizing that Montana was certainly no exception to the national trend of growing populations at women's correctional facilities, the 1999 Montana Legislature passed House Joint Resolution No. 37 (HJR 37), charging the body's LJAC with an examination of specific issues related to female offenders in Montana and the facilities that house them.

CHAPTER 1

STUDY PLAN AND COMMITTEE ACTIVITIES

The study plan adopted by the LJAC at its September 1999 meeting articulated a number of goals that were derived from the wording and intent of HJR 37. The LJAC's goals were that the HJR 37 study result in:

1. an exhaustive review of Montana's correctional system for women;
2. a group of legislators who are educated in the intricacies of the women's prison system and the infrastructure needs of the system from a legislative perspective;
3. identification of the unique needs of women inmates, whether those needs are being met, and why there may be insufficiencies in infrastructure or programming;
4. insight into why so many women are entering the correctional system and what, if anything, the Legislature might do to stem the tide;
5. insight into how programs and policies affect the rates of recidivism; and
6. a determination among LJAC members as to the degree to which Montana Women's Prison policies and procedures are being carried out in accordance with correctional policies, as provided in section 46-18-101, MCA, and

criminal justice policies, as provided in Article II, section 28, of the Montana Constitution.

The Committee tackled these goals with varying degrees of success. In Chapter 4, each of the goals set by the LJAC 1 year ago will be reexamined in light of all that the Committee members learned during the 1999-2000 interim. When appropriate, Committee recommendations may be included. The following is a brief synopsis of the LJAC's activities with regard to the women's prison study.

September 16, 1999 -- Montana Women's Prison (MWP) Tour, Billings

As a first step in completing its assignment, the LJAC held its September 1999 meeting on the MWP campus in Billings. Members spent the day touring the facility, talking with inmates, and learning about the programs and services afforded the inmates. Much of the statistical and program information included in this report was presented to the Committee during that meeting.

During the September meeting, the Committee also received an update on the planned expansion of the facility, a project authorized and funded by the 1999 Legislature through House Bill No. 5 and House Bill No. 14.¹⁵

November 18, 1999 -- Committee Meeting, Missoula

An options paper was presented to the Committee during its November meeting. The paper contained 13 topic areas dealing with the women's prison, most of which were posed in the study plan as issues and questions to be answered. The topic areas were: the demographic profile of the inmates; the increase in the MWP population; placement of female inmates in out-of-state contract beds; classification; length of stay; access to the Board of Pardons and Parole; use of education and

¹⁵HB 5 authorized the expenditure of \$6,475,000 in federal funds, and HB 14 earmarked \$2.9 million in general obligation bonds for the expansion project.

training programs; vocational education; mental health; illegal drug use; spiritual activity; the effectiveness of the system in funneling inmates into appropriate levels of incarceration and providing adequate educational and training opportunities; and data. Committee members were prompted to provide recommendations on each topic. Details of the topics, the information that has been gathered, and the Committee's comments are provided in Chapter 4 of this report.

February 4, 2000 -- Committee Meeting, Helena

HJR 37 requests that the committee undertaking the study of women's prison issues review "the classification system and the extent to which it takes into consideration the unique characteristics of women inmates and whether nonviolent inmates are treated at the appropriate levels of incarceration". Inmate classification in general and classification of female inmates were items on the Committee's February meeting agenda. Details about what the Committee learned are provided in Chapter 4 of this report.

April 14, 2000 -- Crossroads Correctional Center (CCC) Tour, Shelby

On April 14, the LJAC held the second day of a 2-day meeting on the CCC campus in Shelby. Included in the Committee's tour was the pod that will house the female inmates (transferred from New Mexico last December) until the MWP expansion in Billings is complete in 2002. The CCC staff pointed out to the Committee the ways that the facility was modified to provide sight and sound barriers between men and women, and Committee members requested and received information on the similarities and differences in programming and vocational education that exist between MWP and CCC.

July 12, 2000 -- Corrections/Courts Subcommittee Meeting, Helena

In June, the LJAC split into three working groups, one of which was assigned to address remaining matters that the full Committee had undertaken in the corrections and court arenas. At the working group's

meeting in July, members were presented with a comprehensive HJR 37 study report outline and requested to provide comment. Also at that meeting, staff distributed to working group members, for comment and approval, a draft of a survey of female inmates at MWP.

August 2000 -- Committee Survey of the Inmates at MWP

The inmates at MWP were asked to complete a survey that included a number of questions about their backgrounds, family and abuse histories, Indian tribal affiliations, and general satisfaction with the programming and educational opportunities afforded them at the facility. The inmates were assured that their completed surveys would be sealed and that responses would be used in a manner that protected the identities of the respondents. The MWP's Chemical Dependency Counselor distributed and collected the surveys. Of the 70 survey forms sent, 48 were returned completed, a nearly 69% return rate. Throughout this report, when appropriate, survey responses will appear in a shaded box. Because of time constraints, the inmates at CCC were not included in the survey.

CHAPTER 2 BACKGROUND

Timeline

Most of the information for the following timeline was derived from a 1989 report, "History of Women Inmates; A Report for the Criminal Justice and Corrections Advisory Council", and other information collected by Susan Byorth Fox, Legislative Research Analyst.

1871-89	Two women are incarcerated on the third floor of the Territorial Prison in Deer Lodge.	
1889	An 18- by 24-foot building is constructed to house female inmates.	
1895	A larger building, used as a dining room, hospital, and women's prison, is constructed in the prison yard.	<hr/> <hr/> <i>From 1889 to 1910, 60 women are admitted to prison, 30 of them for the crime of grand larceny; others are admitted for burglary, manslaughter, murder, robbery, assault, arson, bigamy, and</i>
1907	A separate unit to house female inmates is constructed outside the main wall of the state prison.	
1923	The first woman is incarcerated for possession of drugs.	<hr/> <hr/>
1928	The first woman is incarcerated for selling drugs.	

1959	<p>The housing for female inmates is converted to a maximum security facility for male inmates. The women are moved to housing over the warden's garage.</p>	<hr/> <hr/> <p><i>From 1911 to 1943, a total of 126 women are admitted to prison.</i></p> <hr/> <hr/>
1963	The women are moved from above the warden's garage to the "old laundry" building behind the warden's house.	
1966	Women are housed in the basement of the guards' quarters (currently the Powell County museum), where there are also cells for administrative segregation.	
1970-75	<p>The guards' quarters are used as a holding facility prior to inmates' transport to Warm Springs or to a facility in York, Nebraska.</p>	<hr/> <hr/> <p><i>From 1943 to 1969, the population of female inmates does not exceed 17.</i></p> <hr/> <hr/>
1975	Warm Springs is used as a holding facility prior to inmates' transport to Nebraska or to California.	
1977	Women inmates are held at the Powell County jail until July. At that point, some minimum security inmates are moved to the Missoula Life Skills Training Center. Other inmates are housed out of state.	
1978	The Billings Life Skills Center opens for 12 minimum security inmates.	

- 1982 The Women's Correctional Center is established in the vacant nurses' dormitory on the Warm Springs Campus.
- 1989 The former Forensic Unit at Warm Springs becomes an expansion unit for women, and five Intensive Supervision slots are reserved for women.
- 1990 The DOC recommends construction of a 120 to 200 bed facility.
- 1991 The Legislature approves issuance of \$10 million in general obligation bonds for a new 120-bed women's prison. House Bill No. 528 outlines the criteria and process for site selection. The Women's Prison Site Selection Committee approves a site in Billings.
- 1993 Problems with the original site in Billings prompt the Legislature to delay the issuance of the bonds and allow for selection of an alternative site.
- 1994 The old Rivendell facility in Billings (MWP's current location) is remodeled and renovated to accept inmates, and the Women's Correctional Center is moved to this location.
- 1998 The population at MWP exceeds the facility's capacity, and the DOC sends 29 inmates to a New Mexico contract facility.
- 1999 The Legislature authorizes the expenditure of \$6,475,000 in federal funds and earmarks \$2.9 million in general obligation bonds for the MWP expansion project, scheduled for completion in 2002.

The number of women in New Mexico has increased to 56, and because of contractor changes at that facility, the women are returned to Montana and housed at CCC, the state's private prison in Shelby, pending completion of the MWP expansion project.

MWP Today

Current capacity: 70 beds.

Expected capacity after expansion: 205 beds.

Appropriated Budget, FY 2001¹⁶

MWP	\$2,278,882
Private Contracts	2,275,249
Prerelease	1,885,201
Intensive Supervision	207,028
Probation and Parole	1,876,852
Total Appropriated for Adult Female Inmates	\$8,523,212

¹⁶Legislative Fiscal Report, June 1999. Montana Legislative Fiscal Division. p. D-40.

CHAPTER 3

NATIVE AMERICAN WOMEN INCARCERATED

While participating in this study, the Committee learned that Native American women make up a disproportionate share of the women serving time at MWP and at CCC. A study of women's prison issues would be incomplete without the inclusion of this information.

Why the Overrepresentation?

Native Americans represent about 6% of Montana's population, yet between 26% and 30% of the population of women incarcerated at MWP and at CCC are of Native American heritage. Theories abound as to the reasons for this, including racism at the arresting stage, racism in sentencing, cultural differences, poverty and unemployment that result in low self-esteem and desperation that leads to crime, the prevalence of physical abuse, and the abuse of alcohol and drugs.

A May 10, 1998, article by Kathleen McLaughlin, *Missoulian* State Bureau, explores the overrepresentation of Native Americans in Montana's prison system. In the article, an MWP inmate who is a member of the Salish-Kootenai Tribes discussed her 13-year-old son's propensity for getting in trouble with the law. "He wanted to come to prison like his mother," she said. "He thought it was OK to be in prison because his mom was here too."

When asked about her solution to the disproportionately high numbers of Native Americans in prison, the inmate, a recovering alcoholic, replied, "Shut down all the alcohol, take it off the reservations," adding, "If it wasn't for prison, and this is sad to say, I'd be dead by now."

In the bigger picture, some point to loss of tribal sovereignty and identity as the root of many of the social ills that lead to high numbers of imprisoned Native American women.

One Perspective on Native American Women in Prison

In her book, *Inventing the Savage; the Social Construction of Native American Criminality* (1998), Dr. Luana Ross reports on her extensive studies of imprisoned Native American women, a subject that has historically received scant attention. Dr. Ross's overriding theme is that Native American criminality is linked to the loss of tribal sovereignty, and she presents historical information--data on incarcerated Native American women in Montana dating from the late 19th century to the modern era--to explore that theory. Ross discusses histories of abuse perpetrated on both White and Native American women and how that abuse is a contributing factor in their having been imprisoned.

The book also draws on interviews with inmates at MWP to document the prison experience and effectiveness of programming and rehabilitation efforts. Ross is highly critical of MWP policy, programming, and the treatment of Native American inmates. She remarks that prison policy is "gendered and racialized" and that programming is perceived by the inmates not as rehabilitative but as domineering and controlling. Ross further attests that programs are not tailored to the unique needs of Native American inmates, nor are sufficient efforts made to accommodate their religious needs.¹⁷

1991-92 Committee on Indian Affairs Sentencing Disparities Study

During the 1991-92 interim, the Legislature's Committee on Indian Affairs (CIA) examined disparities in the criminal sentencing of Native

¹⁷It is neither the purpose nor the intent of this report to support or invalidate Ross's specific criticisms of the Montana prison system with regard to its treatment of Native American inmates, but to fairly convey what the LJAC learned during the course of the HJR 37 study and express any Committee recommendations.

Americans.¹⁸ The report¹⁹ cites a 6-year study conducted during the early 1970s by Edwin L. Hall and Albert A. Simkus to examine the types of sentences imposed on White and Native American offenders.²⁰ In 1974, 3% of Montana's total population was Native American, while 22% to 25% of the male inmates at MSP had that ethnicity--similar degrees of overrepresentation as is seen now among both the male and female institutional populations. The study discussed in the CIA's report did conclude that the types of sentences imposed on Native Americans differed from those imposed on Whites in that "Native Americans were less likely to receive deferred sentences and more likely to receive sentences involving limited incarceration in the state prison."²¹ The CIA report continues, "Hall and Simkus offered some possible explanations for the sentence inequities they found, many of which were related to the negative stereotypes of Native Americans that existed in the 1970s and that, to a certain extent, still exist today. Other explanations included poverty, unfamiliarity with the criminal justice system, visibility in the White community, and perception of the reservation environment as nonconducive to successful probation."

Other sources testifying before the CIA that interim indicated that "sentencing disparities most likely exist, but pinpointing the exact reasons may be very difficult". Further, the CIA report stated, a document presented by the Montana Board of Crime Control entitled *Report on Data Analysis of Prison, Parole, and Probation Information* "offered inconclusive evidence of the existence of sentencing

¹⁸House Joint Resolution No. 56, introduced by Representative Angela Russell in response to the disproportionate numbers of Native Americans incarcerated, called for the study of sentencing disparities.

¹⁹Connie Erickson. 1992. "Improving State-Tribal Relations; Activities of the Committee on Indian Affairs." Montana Legislative Services Division.

²⁰Edwin L. Hall and Albert A. Simkus, "Inequality in the Types of Sentences Received by Native Americans and Whites," *Criminology* 13, No. 2 (August 1975).

²¹Connie Erickson. 1992. "Improving State-Tribal Relations; Activities of the Committee on Indian Affairs." Montana Legislative Services Division.

disparities". The CIA recognized that a full-blown study of sentencing practices in Montana to determine whether sentencing disparities existed would involve more time and resources than the CIA had available.

LJIAC Findings

The LJIAC had significant ground to cover to complete the HJR 37 study, so time to devote to the issue of Native American women being over-represented in the correctional system was limited, but it was discussed at nearly every stage of this study.

Numbers

In September, the LJIAC was given a spreadsheet containing detailed inmate information, including name, race, age, crime committed, crime type, prior crimes and charges, prior felony record, and chemical usage.

Most of the inmates included on this spreadsheet²² had undergone a PSI ordered by the judge and conducted by a Probation and Parole Officer, and it is from the PSI that the information was collected. From that data, the Committee staff compiled the following information and presented it to the LJIAC at its November meeting:

SURVEY RESPONSES -- TRIBAL AFFILIATION

Twelve of the 48 respondents reported to be enrolled members of a Native American tribe.

3 Salish/Kootenai
3 Sioux
2 Northern Cheyenne
1 Little Shell/Chippewa-Cree
1 Little Shell/Cherokee
1 Chippewa-Cree

²²The spreadsheet did not include information on all of the inmates within the system.

- < Out of 195 total inmates on the list, 66 (34%) were Native American, Native American/Black, Native American/White, or Native American/Hispanic inmates.
- < Of those, 42 (63%) had prior crimes and charges (not necessarily a felony record).
- < Among the Native American inmates, represented were 8 DUI offenses; 21 property offenses; 15 drug offenses; 23 violent offenses; and 1 sexual offense.²³
- < Only four Native American inmates showed no evidence of chemical usage on intake; 25 showed alcohol only; 4 drugs only; 32 both drugs and alcohol; and 1 classified as Not Applicable. Of the 129 non-Native Americans, 35 showed no evidence of chemical usage on intake; 14 showed alcohol only; 14 drugs only; and 64 both drugs and alcohol.²⁴

Chemical Usage on Intake ²⁵				
	Alcohol	Drugs	Both	None
Native American	38% (25 of 66)	6% (4 of 66)	48% (32 of 66)	6% (4 of 66)
Non-Native American	11% (14 of 129)	11% (14 of 129)	50% (64 of 129)	27% (35 of 129)

²³The numbers add up to 68 because one inmate has more than one crime type listed.

²⁴The numbers of non-Native Americans do not add up to 129 because chemical usage information is not available for two of the women on the list that was provided.

²⁵These numbers were derived from information provided to the LJAC at its September 16, 1999, meeting by the DOC. The data was collected as part of the inmates' PSIs. It does not represent all of the women in the correctional system, but does provide a sampling.

Whatever the reasons for Native American women being over-represented in the state prison system, the State of Montana is certainly not an anomaly when it comes to imprisoned minorities. National statistics show minority overrepresentation throughout the prison system, with most national studies and statistical information focusing on Black and Hispanic offenders. The U.S. Bureau of Justice Statistics December 1999 Special Report entitled *Women Offenders*²⁶ states that nearly two-thirds of the women confined in jails and state and federal prisons are minorities. To break it down even further, 48% of female state prison inmates are Black, 33% are White, 15% are Hispanic, and 4% "Other" (Asian, Pacific Islander, Native Hawaiian, American Indian, Aleut, and Eskimo).

Race Comparison		
RACE	Female State Prison Inmates Nationwide	Female Inmates in Montana Prisons
White	33%	67%
Non-White	67%	33%
Black	48	0
Hispanic	15	2
Native Am.		26
Other	4	5

Native American women make up a small minority of the women incarcerated nationwide--so small as to be included in the category "Other", yet they represent one-*third* of the women in Montana's prison system.

As this report will illustrate, women in prison exhibit characteristics and have needs different from male inmates, regardless of race. But race cannot be ignored, nor can an inmate's heritage be dismissed, especially

²⁶Greenfield and Snell. 1999. "Women Offenders" (Bureau of Justice Statistics Special Report No. NCJ 175688). Washington, D.C.: U.S. Department of Justice.

as the numbers continue to reflect the imbalance in minority imprisonment nationwide and in our own backyard.

CHAPTER 4 COMMITTEE GOALS, FINDINGS, AND RECOMMENDATIONS

GOAL #1. Conduct an exhaustive review of Montana's correctional system for women.

A. Statistical Demographic Information

(Who is incarcerated in Montana's correctional system for women?)²⁷

Current Numbers of Offenders in Montana

- < In August 2000, a total of 291 women had inmate status with the Montana DOC.

- < Seventy-four women were incarcerated at MWP, 52 women were held in contract beds at CCC in Shelby, 15 were in contract jails awaiting assignment to a facility, 3 were at boot camp, and 147 were in intensive supervision programs, prerelease centers, and chemical dependency programs.

- < 1,300 to 1,600 female offenders are on probation and parole on any given day.

Inmates With Children

- < A March 1999 review indicated that 67% of the inmates had children under 18 years of age.

Education

²⁷Data is derived from figures provided by the DOC to the LJAC in September 1999 and from other information provided by the Department to the LJAC staff during the 1999-2000 interim.

- < Seventy-eight percent of the women at MWP had a high school diploma or GED on intake, and 15% had education beyond high school.
- < Of the inmates involved with the GED program, 94% had fulfilled all or part of the requirements for a GED prior to leaving the prison.

*Crimes Represented*²⁸

- < Twenty-five percent of the women at MWP and CCC are considered violent offenders, compared to 28% of the women in state prisons nationwide.²⁹
- < Of the women incarcerated at MWP and CCC with just one felony nonviolent conviction, the conviction profile breaks down as follows:
 - 22%-- sale and possession of drugs;
 - 13%--DUI;
 - 13%--criminal endangerment conviction;
 - 13%--theft; and
 - 15%--issuing a bad check over \$150.
- < Most women do not end up in prison on their first nonviolent conviction, and many who do are imprisoned for parole violations. Twenty-six percent of the females incarcerated at MWP and CCC are in prison with just one nonviolent conviction. The rest of the population has either one or more violent convictions or more than one nonviolent conviction.

²⁸The conviction profile of females incarcerated at MWP and CCC was provided to the LJAC's Corrections/Courts Subcommittee by the DOC on July 12, 2000.

²⁹Greenfield and Snell. 1999. "Women Offenders" (Bureau of Justice Statistics Special Report No. NCJ 175688). Washington, D.C.: U.S. Department of Justice.

History of Physical or Sexual Abuse

- < Self-reported data indicate that 65%-70% of the inmates have verbal, physical, or sexual abuse histories.

Incidence of Chemical Dependency, Co-Dependency, and Mental Illness Among the Population

- < The DOC reported that at least 90% of the women's prison population have chemical dependency or co-dependency problems upon entering prison. All of those inmates are assessed and referred for treatment. Some women go to inpatient treatment before entering prerelease, but most finish chemical dependency treatment before release.
- < Fifty percent of the inmates have a diagnosed mental illness requiring psychotropic medication.

Recidivism (New Crime Conviction Rate)

- < According to ACIS data captured on September 13, 1999, between July 1, 1996, and September 13, 1999, 17 female offenders were convicted of new crimes after their release from supervision, resulting in a 5.473% recidivism rate among women.

SURVEY RESPONSES -- CHARACTERISTICS OF RESPONDENTS

Family Background

Were you raised in a two-parent family?

72.9%--Yes

27.1%--No

What was your family's income level when you were a child?

39.6%--middle class

16.7%--working poor

16.7%--lower middle class

16.7%--upper middle class

8.3%--poverty

2.0%--no answer

0%--wealthy

Sexual or Physical Abuse

Were you a victim of physical or sexual abuse as a child?

50.0%--Yes

41.7%--No

6.2%--Uncertain

2.1%--no answer

Have you been a victim of physical or sexual abuse as an adult?

52.1%--Yes

45.8%--No

2.1%--no answer

Children

How many children do you have?

22.9%--2 children

20.8%--1 child

18.8%--No children

35.4%--3 or more children

2.1%--no answer

27.1% of the inmates who have children indicated that their children are over 18.

Who cares for your children while you are incarcerated?

27.1%--child's grandmother or grandfather

22.9%--child's father

10.4%--other (specified sister, child has been adopted)

8.3%--child is in foster care

SURVEY RESPONSES -- CHARACTERISTICS OF RESPONDENTS, continued

Employment

Were you employed at the time of your arrest?

54.2%--No

45.8%--Yes

What was your personal income level at the time of your arrest?

45.8%--Under \$10,000

25.0%--\$10,000 to \$20,000

14.6%--Uncertain

6.2%--\$30,000 to \$40,000

One respondent indicated that she was earning \$40,000 to \$50,000 illegally and \$10,000 to \$20,000 legally.

Drugs and Alcohol

58.3% of the respondents say they have been diagnosed with a drug problem.

50.0% think they have a drug problem.

52.1% of the respondents say they have been diagnosed with an alcohol problem.

43.8% think they have an alcohol problem.

43.8% of the respondents say they are in a treatment program for drugs or alcohol.

22.9% are not in treatment.

27.1% (13 inmates) say they are on a waiting list.

B. Women in Shelby and MWP Expansion

A portion of the preamble to HJR 37 focuses on the difficulties associated with out-of-state and regional placement of women inmates:

WHEREAS, since May of 1998, Montana women inmates have been placed in out-of-state contract beds in Gallup, New Mexico, and in regional correctional facilities because of extraordinary growth in the population of the women's correctional system; and

WHEREAS, transferring women inmates to out-of-state prisons and to regional correctional facilities for incarceration focuses primarily on the housing needs and insufficiently on the rehabilitation or treatment needs of women inmates; and

WHEREAS, out-of-state and regional placement of women inmates compromises maintaining contact with their families, job training, and educational opportunities needed for the women to successfully make the transition back into society.

At the time that HJR 37 was drafted, over 40 Montana inmates were being held at the McKinley County Adult Detention Center in Gallup, New Mexico, and by the Committee's first meeting of the interim in September 1999, that number had reached 57. Changes in the New Mexico facility contractor and the possibility of having to move the women to Texas or Oklahoma prompted the DOC to enter into a 30-month contract with Corrections Corporation of America (CCA) to house the women at CCC in Shelby. In December 1999, 52 women arrived at CCC from New Mexico. There are currently no women being housed out of state.

In April 2000, the LJIAC toured CCC, including the pod where the women live. The CCA staff showed the Committee the contractually

required sight and sound barriers between the men and the women that were put in place when it was determined that Shelby would temporarily house the women being moved from New Mexico. Those barriers include strategically painted windows; an obstruction in a hallway where, if no barrier was placed, men in a nearby pod would be able to see the women as they leave their area and enter the hallway; and a wall built just prior to the women's arrival that prevents visual or audio contact between the men's and women's pods. In addition to the structural modifications, control center staff at CCC pay strict attention to "red movement" and "purple movement" (terms for male and female inmate movement in the facility that reflect the color of the clothing that inmates are assigned) to prevent inmates of opposite genders from meeting in a hallway.

The CCC staff told the Committee that programs available to women at the Shelby facility included a chemical dependency program, a ministerial program, and a wellness program. Educational opportunities in which women were involved included a GED class, life skills, and computers. The Committee was told that the women do not have access to vocational education at CCC because scheduling the vocational education facilities for women while maintaining the required sight and sound barriers between the men and the women proved too difficult.

Barring anything unforeseen, CCC will house women in Shelby until the expansion of MWP is completed. Completion is scheduled for December 2002 and will result in the addition of 135 more beds, for a total capacity of 205 inmates.

The LJAC recommends that the 2001-02 Committee explore potential parity issues, programming issues, and costs and benefits of regional placement of female inmates versus placement in a single central facility.

C. Classification

HJR 37 requests that the study include a review of "the classification system and the extent to which it takes into consideration the unique characteristics of women inmates and whether nonviolent inmates are treated at the appropriate levels of incarceration".

Prior to the Committee's September 1999 meeting on the MWP campus, the LJAC staff posed a series of questions to MWP Warden Jo Acton concerning classification. Warden Acton provided the Committee with written answers, which are quoted directly below.

- Q. What factors are considered in determining an inmate's classification? How does the nature of the crime committed factor into an inmate's classification and subsequent level of incarceration?
- A. To determine the offender's initial classification the case managers use: court judgements, pre-sentence investigation reports, reports of prior crimes, revocation reports from probation and parole, [and] disciplinary decisions from community placement. Crimes are scored according to the offense severity classification in the manual and the crime severity is scored numerically on one of the instrument items.
- Q. Does an offender's history of sexual or physical abuse and drug use factor into her classification?
- A. The classification instrument only reviews risk, it does not assess treatment needs.

In February, Candyce Neubauer, the DOC's Classification Manager, explained the classification procedure for both the male and female inmates in Montana's correctional system. What follows is an excerpt from the minutes of that meeting,³⁰ encapsulating what the Committee was told about classification.

- < When inmates enter the prison systems, they are placed in the receiving unit at MSP or the reception unit at MWP.
- < While in receiving or reception, offenders go through medical, educational, chemical dependency, and mental health assessments to determine their needs. If an offender is a sex offender, the offender goes through a sex offender assessment.
- < For inmates who are parole eligible, the Board of Pardons and Parole is part of the process to reinforce to the offender court- ordered and recommended treatments.
- < A classification assessment is conducted to establish an inmate's custody level; to assess the risk that an inmate poses to the institution, other inmates, and staff; to identify predatory offenders; and to allow the institutions to separate them accordingly.
- < Custody levels determine the amount or degree of supervision needed to manage the inmates.
- < There are six levels of custody at MSP: maximum security custody that includes administrative segregation inmates;

³⁰LJIAC minutes, February 4, 2000. A copy of the minutes is maintained in the Legislative Services Division office, Helena, Montana. Minutes can also be accessed via the LJIAC's Internet page at < http://leg.mt.gov/Interim_Committees/LAW_JUSTICE > .

close custody; medium restricted custody; medium unrestricted custody; minimum restricted custody; and minimum unrestricted custody.

- < There are five levels of custody at MWP: maximum security that includes disciplinary segregation; close custody; medium custody; minimum 1; and minimum 2.
- < Security levels and factors include perimeter fences, physical restraints, and the amount of security staff supervision.
- < The staff-inmate ratio is much higher in the maximum security and close custody levels of security than in other levels.
- < MSP has four security levels--high security; low security; maximum security compounds; and the outside living area. In February, there were 82 inmates housed outside the MSP perimeter.
- < MSP also codes its security levels by the color of an inmate's coveralls.
- < MWP has three security levels--high and low security and administrative segregation.
- < To determine the appropriate custody level of each inmate, an objective classification instrument is implemented that is easy to understand and easy to use.
- < Inmates are reassessed on the severity of crime, sentence lengths, prior criminal history, institutional behavior, and treatment participation.

- < One factor that determines the custody level of inmates is the length of sentence. Inmates receiving lengthy sentences are placed in close custody. Inmates are not eligible for minimum security placement until they are within 2 years of release.

After the primer on classification in general, the Classification Officer at MWP engaged Committee members in an exercise to reclassify fictional inmate Jane Doe, using the Offender Reclassification Instrument and Ms. Doe's Inmate Data Sheet.

Separate or Modified Classification Systems for Women

In 1998, the National Institute of Justice published a report entitled "Women Offenders: Programming Needs and Promising Approaches".³¹ State-level correctional administrators, prison and jail administrators, and program administrators were surveyed to identify a variety of needs specific to female offenders and women's prisons. The report states that:

. . . the most commonly mentioned management problem [among those surveyed], noted in 11 states, was in the area of classification and screening. Administrators at all levels said that classification and screening procedures did not provide needed information, were not adapted to women, and were not useful in matching women's needs for programming. About one in four administrators said that current techniques of classification and assessment are problematic with respect to women. Despite women's different needs, circumstances, and risk profiles, the same classification instrument was used for women and men in

³¹Morash, Bynum, and Koons. August 1998. "Women Offenders: Programming Needs and Promising Approaches" (National Institute of Justice *Research in Brief*). Washington, D.C.: U.S. Department of Justice, Office of Justice Programs.

39 states; in 7 states the instrument for men was adapted for women, and in 3 states, a special instrument was used.

A 1991 study conducted by Peggy Burke and Linda Adams of the COSMOS Corporation and funded by a grant from the National Institute of Corrections, U.S. Department of Justice, thoroughly investigated current classification practices used for female offenders, identified problems, and provided guidance for practitioners in assessing their own classification procedures.³² The authors surveyed corrections administrators in 48 states for information on current practices, finding results similar to those reported 8 years later in the National Institute of Justice's report referenced above.³³ The report stemmed in part from growing "concern that classification systems simply do not work for women offenders".

One of the primary reasons why many of the practitioners surveyed felt that the systems did not work for women offenders was that "most women's institutions are able to focus more upon habilitation concerns because of the proportionately lower incidence of violence and predatory behavior among their inmates", while most classification systems are designed to keep order and ensure safety within the institutions. Security and habilitation are two of the major interests in any prison, Burke and Adams maintain, and "where the population is large, violent, predatory, disorderly, and dangerous, an institution focuses most of its resources on security concerns". Burke and Adams continue, "It is not that habilitation is not a concern, but rather that the institution has to set priorities, and there is more of an emphasis on security. Where the

³²Burke and Adams. March 1991. *Classification of Women Offenders in State Correctional Facilities: A Handbook for Practitioners*, COSMOS Corporation, Washington, D.C.: National Institute of Corrections, U.S. Department of Justice (grant No. 89PO2GHD7).

³³Burke's and Adams' study found that 40 states had the same classification systems for men and women; 4 states reported significant differences in classification; and 4 reported that the systems were "adapted or used differently for women, or that policies and procedures were different for men and women".

population is less violent, dangerous, and predatory, an institution can focus more of its resources on habilitation concerns."

The report does not, however, recommend that separate classification systems be designed for women, citing potential parity issues and the risk of legal challenge. Instead, the authors conclude that "within an individual jurisdiction, classification should be gender-neutral, both on its surface and in its effect", but the systems "should be designed to achieve the objectives held for offenders at various levels within the system". According to Burke and Adams, a classification system that would work most effectively for most of the women's institutions observed in the study is one that is "habilitation-oriented", rather than risk-based. In sum, they suggest an "approach to classification that will support institution-specific objectives with offenders".

In Montana, the classification procedure (assessed and revalidated in 1998 by the National Council of Crime and Delinquency) is the same for men and women, but MWP staff reported to the Committee at its September 1999 meeting that the "instrument is tailored to take into account the gender differences".³⁴

D. Programming

The LJAC requested information on program opportunities afforded the women at MWP and learned the following:

- < Programs at MWP fall into one of three categories: court-ordered; treatment-recommended; and optional. An inmate who chooses not to participate in a court-ordered program is considered ineligible for parole until the program is completed. Inmates are also warned that they will not be

³⁴See page 8, modified HJR 37 Women's Prison Study Plan, contained in Exhibit #1 of the LJAC's September 16, 1999, meeting minutes.

recommended for community-based placement (prerelease or the Intensive Supervision Program) if they do not comply with court-ordered programming. Inmates are assessed for specific mental health, education, and chemical dependency needs as part of the intake process. "Based on the crime committed and the findings of those assessments," the MWP Offender Handbook reads, "appropriate programs are recommended by the Montana Women's Prison. If the inmate is able, but chooses not to participate in the recommended program(s) she will be considered 'non-compliant' on the classification instrument", and the inmate may not be recommended for community placement. The only rule associated with the optional programs is that an inmate must complete any that she starts. Dropping out of an optional program without staff approval is considered "non-compliance".

- < The MWP contracts with community providers for medical services, mental health program services, chemical dependency program services, wellness program services, and education programs.
- < Group activities are facilitated by mental health professionals, professional counselors, certified chemical dependency counselors, recreational specialists, occupational therapists, and a variety of volunteers.
- < The list of programs includes: parenting, cognitive and behavior groups, mental health groups, wellness and general health, and chemical dependency.
- < A December 18, 1998, memo from Mike Wingard, Performance Audit Manager, Legislative Audit Division, to

the Legislative Audit Committee describes the kinds of programs offered at MWP. The memo concludes that the number and variety of programs have improved and that the Department has placed an increased emphasis on programming.

However, the memo also concludes that program performance has historically been difficult to assess "due to lack of information about program outcomes". Wingard further notes that "neither MWP nor the Department compiles data on program results or determines whether the current programmatic resources impact inmate length of stay".

< The same audit memo noted a need for creation of a seamless delivery of education, training, and treatment services between the prison and prerelease centers. The memo also suggested a need for enhanced

*SURVEY RESPONSES --
CHEMICAL DEPENDENCY
PROGRAMMING*

35.4% of the inmates who responded to the survey report that they are satisfied with the treatment that they are receiving for an alcohol or drug problem. One inmate commented that MWP offered "the best I ever had treatment-wise . . .".

16.7% do not believe that they are receiving adequate treatment.

47.9% did not respond to this question. In large part, those who did not respond were new arrivals, not enrolled in treatment, or on a waiting list or had not been diagnosed with a chemical dependency problem.

Inmates who were unsatisfied reported that they would like to see more indepth, intense, strict, and severe chemical dependency programs. One inmate commented that she heard others say that they could "do the programs standing on their heads".

coordination between the prison and inmate supervisors at prerelease centers to emphasize continuation of programs.

- < DOC Director Rick Day told Committee members in a letter dated October 15, 1999, that more than 98% of the women choose to participate in programming and that "similar programming is available regardless of classification".
- < During its August 2000 meeting, the LJAC was told that MWP had recently initiated a new chemical dependency program designed specifically for women and that early results were positive.

The LJAC recommends that the DOC examine the effectiveness of its current chemical dependency programs.

The LJAC also recommends that the

Effective Programming and Training

For the National Institute of Justice's (NIJ) report, "Women Offenders: Programming Needs and Promising Approaches", state-level correctional administrators, prison and jail administrators, program administrators, and program participants were asked to identify program elements that they believed contributed to the success of programs in their jurisdictions. Page A-51 of this document contains the responses, quoted directly from the NIJ report referred to above.³⁵

³⁵Morash, Bynum, and Koons. August 1998. "Women Offenders: Programming Needs and Promising Approaches" (National Institute of Justice *Research in Brief*). Washington, D.C.: U.S. Department of Justice, Office of Justice Programs.

Program Elements Related to Success

Program Staff

- < Staff are dedicated/caring/qualified.
- < Ex-addicts or ex-offenders are on staff.
- < Women staff members serve as role models.

Meeting of Specific and Multiple Needs

- < Program has a comprehensive or multifaceted focus.
- < Program addresses rudimentary or basic needs.
- < Program establishes a continuum of care.

Program Participation

- < Participants like the program.
- < Inmate participation is high or self-initiated.
- < Participants help run the program.

Peer Influence

- < Other participants provide positive peer influence.
- < Other participants provide pressure.
- < Other participants provide support.

Individualized, Structured

- < Clear, measurable goals are established.
- < Treatment plans and programming are individualized.
- < Program is intensive and of appropriate duration.
- < Appropriate screening and assessment are provided.

Technology, Resources

- < Equipment, money, and other resources are available.
- < Adequate space is available.

Acquisition of Skills

- < Marketable job skills can be acquired.
- < Parenting and life skills are taught.
- < Education addresses thinking and reasoning.
- < Anger management is taught.

Program Environment

- < Atmosphere is "homey"; climate is conducive to visits.
- < Communications are open; confidentiality is kept.
- < Rapport with other participants is good.
- < Participants are separated from the general population.
- < Program enrollment is small.

Victimization Issues

- < Program addresses self-esteem.
- < Women are treated like human beings.
- < Program addresses domestic violence.
- < Program addresses empowerment and self-sufficiency.

Administration and Staff Interaction

- < Administrative support and communication are good.
- < Management style is nonaggressive.
- < Security staff are understanding and supportive.

Assistance From Outside the Facility

- < Outside private-public partnerships exist.
- < Interagency coordination exists.
- < Some staff come from outside the department of corrections.

E. Education/Training/Vocational Education

At its September 1999 meeting, the Committee learned that the DOC had received a \$17,000 grant made possible by the Carl D. Perkins Vocational and Technical Education Act of 1998. A report prepared by MWP staff in conjunction with the grant, entitled *"Prison to Work" A Program of Vocational and Job Seeking Skills for Inmates at Montana Women's Prison*,³⁶ states that "assessment of educational/vocational training begins as a component of prison intake processing. MWP staff formulates a treatment plan for each inmate, based on individual need and treatment/therapy requirements. . . . Job skills enhancement is generally a very important topic within the overall plan." The report continues that the "vocational education program at Montana Women's prison consists of computer skills related to a business office setting. The goal is to teach the students adequate skills to allow them to obtain employment that provides economic freedom when they leave the institution. . . . The vocational education program mirrors a curriculum developed by the Billings Adult Education staff. . . ."

According to the report, the vocational education program has received positive support from inmates and staff. Seventy-six students participated in the program during the 1998-99 school year, more than doubling the level of computer competency among inmates. The \$17,000 grant is being used to purchase 13 computers and to upgrade software programs and purchase necessary supplies.

Stated program goals are for 75% of the enrolled students to complete the program and for 10% of those completing the program to obtain employment in an office environment. The DOC plans to track the students once they leave the prison, monitor their activities for 6 months, and record their employment activities.

³⁶A copy of this report is included with Exhibit #1 in the LJAC's September 16, 1999, minutes, maintained by the Legislative Services Division.

Educational programs include computer literacy and computer applications, GED components, and Adult Basic Education. The MWP staff report that one of the unmet needs that they have identified in

SURVEY RESPONSES -- EDUCATION AND TRAINING

54.2% of the inmates at MWP report that they are satisfied with the educational and vocational opportunities provided to them.

39.6% report that they are unsatisfied and would like to see more:

- * hands-on training;
- * on-the-job training in the community for the low-risk inmates and additional on-the-job training other than telemarketing;
- * "realistic" job training such as training for waitress, cleaning, and store clerk jobs;
- * "practical" job training for an employable trade or skill;
- * college-level courses and course opportunities beyond GED certification;
- * advanced computer training; and
- * varied vocational training opportunities.

education and training is the ability to develop specific job training programs beyond what is available in computer skills courses. This unmet need is also reflected in the responses to the survey that the Committee conducted of the inmates.

The LJAC recommends that the DOC examine the effectiveness of its current education, training, and vocational educational programs.

The LJAC further recommends that the DOC explore developing more hands-on, practical training within the institution to better prepare inmates

F. Access to the Board of Pardons and Parole

The preamble to HJR 37 states in part, "the ability of the women to prepare for and attend timely parole hearings needs to be reviewed in light of the great distances placed between women inmates and the administration of the Montana Women's Prison and the Board of Pardons and Parole".

The following is derived from information provided to the Committee by Craig Thomas, Executive Director, Board of Pardons and Parole, and by staff at MWP.

- < Mr. Thomas reported to the Committee that the distance between female inmates in Billings and the Board of Pardons and Parole in Deer Lodge has not resulted in any delays of parole hearings.
- < The Board of Pardons and Parole conducts parole hearings, parole revocation hearings, rescission hearings, preparole school, and prerelease screening at MWP once a month, the same frequency with which the Board conducts the same procedures at MSP and at CCC in Shelby. The Board also conducts business once a month at the Missoula, Butte, Billings, and Great Falls prerelease centers.
- < The Board of Pardons and Parole conducted hearings, prerelease screening, and sentence review for the female

inmates who were housed in New Mexico via video conferencing.

- < The 1999 Legislature enacted Senate Bill No. 20 (Ch. 450, L. 1999), authorizing the Board of Pardons and Parole to hold parole and revocation hearings via video conferencing and to hold administrative reviews via telephone conferencing. However, the Board prefers face-to-face meetings when making release decisions.
- < The Board of Pardons and Parole meets monthly at the regional facility in Great Falls and every other month at the regional facility in Dawson County. The Board also plans to meet monthly at the Missoula regional facility.
- < Mr. Thomas appeared before the Committee at its November 1999 meeting in Missoula to present an overview of the Board of Pardons and Parole and its functions.

G. Mental Health

Along with the increase in the number of females incarcerated, correctional systems nationwide have seen an increase in the numbers of both male and female inmates assessed as mentally ill. The Bureau of Justice Statistics indicates that 15.8% of male state prison inmates and 23.6% of female state prison inmates are mentally ill and nearly 8 in 10 female mentally ill inmates report having been the victim of physical or sexual abuse.³⁷ As is noted previously in this document, about 50% of

³⁷Paula M. Ditton. July 1999. "Mental Health and Treatment of Inmates and Probationers" (Bureau of Justice Statistics *Special Report* No. NCJ 174463). Washington, D.C.: U.S. Department of Justice.

the inmates at MWP have been diagnosed with a mental illness for which they are taking medication.

Appropriate diagnosis and treatment of mentally ill prison inmates remain a topic of intense, heated discussion among policymakers, inmate advocates, mental health professionals, and corrections officials.

The members of the LJAC learned that in Montana, inmates' mental health needs are assessed during the intake process and a psychiatrist determines whether medication is appropriate. Inmates' personal history and the offenses committed are considered as part of the mental health assessment and treatment options.

The MWP staff report that they attempt to encourage women to learn coping skills so that they may not have to be entirely dependent on drugs. Alternatives to drug treatment are emphasized in the group mental health activities. All inmates who are taking psychotropic medication are required to participate in mental health groups. A full-time clinician and a mental health aide are on staff at MWP. A psychiatrist visits weekly and is available on call.

The LJAC supports the DOC's efforts in teaching women inmates coping skills and life skills, including anger management, that will facilitate their successful return to society as well as enhance their future employability.

The LJAC recommends that during the 2001-02 interim, the Committee review the results of the work of other committees that are exploring mental illness among correctional populations. The LJAC also recommends that the Committee examine any disparities between male and female correctional populations with regard to

H. Drug Use

Subsection (4) of HJR 37 provides that the Committee should explore "any evidence of abuse of legal and illegal drugs and use of legal drugs within the Montana Women's Prison and any out-of-state or regional placements . . .". The Committee posed a series of questions to Warden Acton. The questions and answers are verbatim as follows.

- Q. Do staff at MWP undergo random drug testing?
- A. Only for cause as per personnel policies of the State of Montana.

- Q. Do inmates undergo random drug testing?
- A. Only for cause at this time. Procedures are being developed to complete random testing under federal recommendations. However, all new intakes are tested upon arrival.

- Q. What is the incidence of illegal drug use among inmates?
What is the incidence among staff?
- A. At this time there is no documented/proven incidents of illegal drug use for inmates or staff. The only positive tests we have had are the intakes who have been in county jails or have residual buildup from heavy use prior to being jailed.

- Q. What are the consequences of illegal drug use among inmates or staff?
- A. Inmates would receive a severe write-up, staff would be subject to disciplinary action up to and including termination.

Drug Use Among Probationers and Parolees

In a July 2000 presentation to the LJAC, the DOC staff provided information on positive urinalysis tests of 2,940 male and female probationers and parolees, 49% of the probation and parole population. The results³⁸ show some interesting differences between the men and the women.

Substance Screened	% of Women Testing Positive	% of Men Testing Positive
Marijuana	11.8	16.4
Cocaine	4.1	1.8
Amphetamines	7.5	3.7
Meth	9.1	5.4
Opiates	10.6	2.9
Alcohol	3.5	8.1
Barbiturates	4.9	0.0

According to MWP Chemical Dependency Counselor, Sue Orand,³⁹ although men in general gravitate toward alcohol and marijuana, women prefer the "powders and pills" types of drugs and are more likely to be "poly-drug addicted", resulting in their testing positive for more than one drug. Ms. Orand also states that women are more likely to become addicted to prescription drugs partly because they are more likely than men to seek treatment. Additionally, women tell Ms. Orand that they took stimulants such as meth, amphetamines, and prescription drugs because "they just couldn't get everything done" and wanted a quick energy boost. Apparently, women also prefer the drugs for which they often test positive because they can contribute to weight loss and

³⁸This information was provided by the DOC to the Corrections/Courts Subcommittee of the LJAC at its July 12, 2000, meeting. A copy of the materials distributed is maintained by the Legislative Services Division.

³⁹An explanation of the differences in drug use among men and women was provided to the LJAC staff by Mike Cronin, DOC Information Officer, based on his discussion with Sue Orand, MWP Chemical Dependency Counselor.

promote a sense of well-being that is psychologically different from the effects of alcohol or marijuana.

DOC staff told Committee members that probationers and parolees are tested if there is suspicion of drug or alcohol use. Positive tests result in a variety of sanctions, including time in jail, referral to chemical dependency counseling, a higher level of supervision, or restricted movement.

I. Spiritual Needs and Religious Activity

Currently, there is no chaplain on staff at MWP; two chaplains are on staff at MSP. Most spiritual activity at MWP is led by volunteers from the community or by the inmates.

The 1997 Legislature passed House Joint Resolution No. 24, providing legislative consent for the construction of the spiritual activity center. An organization in Billings has been raising funds for the construction of the center on the MWP campus, and the organization has enlisted the assistance of a volunteer architect to complete the plans. Efforts are underway to coordinate the MWP expansion with the construction of the spiritual activity center, at least to the extent that one project does not adversely affect the other. Groundbreaking for the spiritual activity center commenced during the summer of 2000.

SURVEY RESPONSES -- RELIGION

Do you believe your religious/spiritual needs are being met while you are in prison?

52.1%--Yes

43.8%--No

Respondents who answered No indicated that they would like to see:

- * a sweat lodge (4 respondents mentioned this);
- * more Native American teachings
- * the ability to order materials from more than one vendor (4 respondents mentioned this);
- * at least a full hour for Sunday services;
- * more time to worship;
- * more frequent Catholic Masses with a priest;
- * a place to go for meditation and quiet time; and
- * more frequent nondenominational services.

The Committee was informed of Native American inmates' desire for a sweat lodge during the September meeting. The MWP staff told the Committee that a sweat lodge was not possible on the campus because it is located within the Billings city limits and city ordinance does not allow open burning. Women at CCC, however, do have access to a sweat lodge.

DOC staff told the Committee at its August 2000 meeting that MWP staff had not received many requests for a sweat lodge, so they did not believe that approaching the city of Billings for an exemption from the open-burning ordinance was warranted at this time. The DOC staff stated, however, that they would not oppose seeking an exemption if MWP staff received enough requests from inmates that it do so, and that the inmate council at MWP would be an appropriate vehicle through which interested inmates could make such a request.

The LJAC recommends that any reasonable resources be made available to the inmates to accommodate their spiritual needs, including the performance of rituals and ceremonies that are integral to the practice of inmates' religions.

The LJAC also recommends that the DOC include in a future

J. General Effectiveness of the System

Subsection (5) of HJR 37 provides that the Committee should examine "the ability of the system to funnel women inmates into the least restrictive environment during their incarceration in order to be able to access training and education to enhance their future ability to obtain and maintain employment, to learn parenting skills, be reunited with their families, and become productive members of society, and to prevent recidivism".

GOAL #2. Develop a group of legislators who are educated in the intricacies of the women's prison system and the infrastructure needs of the system from a legislative perspective.

Most legislators suffer from information overload, particularly during sessions when membership on committees and participation on the floor require them to know a little bit about everything. The sheer volume of information that legislators are exposed to prevents development of expertise in more than a few areas. The interim is designed, in part, to be an educational experience for the members of interim committees.

For many of the members of the LJAC, September's tour of MWP marked their first encounter with women's prison issues, and the summary of Committee activities provided early in this report is

testimony that a member would probably had to have missed every single meeting to not have learned something about the prison system for women. A few of the members of the LJAC will be lost to term limits, but the Committee will be sending several legislators to the 2001 Session with first-hand knowledge of the facilities that house female inmates, with extensive information on the characteristics of Montana's imprisoned women, and with a basic understanding of the DOC's policies and procedures as they pertain to women in the system.

GOAL #3. Identify the unique needs of women inmates, whether those needs are being met, and why there may be insufficiencies in infrastructure or programming.

When asked what the Legislature could do to make the correctional system for women work more effectively in Montana, Warden Acton replied, "Recognize that women offenders have specific needs and do not relegate this population to second place simply because it is smaller and quieter."

The majority of this report and the primary focus of the Committee's activities centered around the unique characteristics of female offenders and how their needs differ from male prisoners. History of abuse; drug and alcohol use; different mental health and medical needs; numbers of inmates with minor children; institutional behavior; and the nature of the crimes committed are just a handful of the characteristics that warrant approaches to the female population different from those traditionally employed for male populations. In a December 1998 edition of *Corrections Today*, American Correctional Association Executive Director James A. Gondles, Jr., predicts, "How we address the unique problems posed by the growing female offender population will be one of the biggest challenges facing the [corrections] profession in the next millennium."

GOAL #4. Gain insight into why so many women are entering the correctional system.

Like the disproportionate number of Native American women in prison, the increase in the number of women going to prison cannot be attributed to just one or two factors--a fact that is painfully clear to anyone who sets out to study women in prison and why women end up in prison.

The Committee used the HJR 37 study not necessarily as a means to determine the precise reasons for the increase in the female prison population, but to learn about the population, the facilities where they live, the programs that they are offered, and the DOC's policies. The Committee members recognized that they had no hope of gaining insight into the "whys" of the population growth without first learning about who is incarcerated in Montana, where they came from, and how they live.

Following is a collection of opinions from various sources that speak to why the population of women in prison has increased so dramatically on the national scale.

The increase in women's imprisonment largely can be accounted for by increases in minor property crimes (mostly larceny-theft) and drug and public order offenses.⁴⁰

There appears to be an increased willingness both to incarcerate women and to give them longer sentences.⁴¹

⁴⁰Joanne Belknap. "Access to Programs and Health Care for Incarcerated Women", Vol. 60, *Federal Probation*, 12-01-1996, pp. 34-39.

⁴¹Ibid.

In 1979, one in 10 women in prison was doing time for drugs. Today, drug offenders account for more than a third of the female prison population (37.4 percent).⁴²

As has been previously noted, DOC records indicate that drug offenders account for 22% of the female prison population in Montana.

Many observers suspect that the increase in women's imprisonment is due to an array of policy changes within the criminal justice system, rather than a change in the seriousness of women's crime. Certainly, as data on the characteristics of women in prison indicate, the passage of increased penalties for drug offenses has been a major factor.⁴³

The impact of gender-blind sentencing, coupled with what might be seen as increased policing of women's behavior while on probation or parole, have played major, though largely hidden, roles in the growth of women's imprisonment.⁴⁴

Substance abuse, compounded by poverty, unemployment, physical and mental illness, physical and sexual abuse, and homelessness, often propel women through the revolving door of the criminal justice system.⁴⁵

GOAL #5. Gain insight into whether programs and policies affect the rates of recidivism.

⁴²Meda Chesney-Lind. "The Forgotten Offender; Women in Prison: From Partial Justice to Vengeful Equity", *Corrections Today*, December 1998, p. 68.

⁴³Meda Chesney-Lind. "The Forgotten Offender; Women in Prison: From Partial Justice to Vengeful Equity", *Corrections Today*, December 1998, p. 68.

⁴⁴Ibid.

⁴⁵Barbara Owen and Barbara Bloom. "Profiling Women Prisoners: Findings from National Surveys and a California Sample", *Prison Journal*, June 1995 v75, n2, p.165.

According to ACIS data captured on September 13, 1999, between July 1, 1996, and September 13, 1999, 17 female offenders were convicted of new crimes after their release from supervision, resulting in a 5.5% recidivism rate among women.

The Committee was provided with information about the various programs offered at MWP and at CCC but did not delve deeply into the perceived or actual effectiveness of the programs, primarily because data about program effectiveness and outcomes was not available.

The LJAC recommends that solid data be collected to evaluate the effectiveness of programs and to track program outcomes.

The LJAC also recommends that during the 2001-02 interim, the Committee review any data that has been collected regarding

GOAL #6. Develop a determination among LJAC members as to the degree to which Montana Women's Prison policies and procedures are being carried out in accordance with correctional policies, as provided in section 46-18-101, MCA, and criminal justice policies, as provided in Article II, section 28, of the Montana Constitution.

Montana Code Annotated, 1999

Section 46-18-101, *in part*, provides:

46-18-101. Correctional and sentencing policy. (1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense;

(b) protect the public by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement.

Montana Constitution

Article II, section 28, provides:

Section 28. Criminal justice policy -- rights of the convicted. (1)

Laws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims.

(2) Full rights are restored by termination of state supervision for any offense against the state.

Bearing in mind the recommendations and comments submitted by the Committee in the preceding pages, the LJIAC is generally encouraged by the DOC's operation of and improvements to the women's prison system.

The LJIAC trusts that in future interims, the Committee will continue to follow up on women's prison issues as appropriate, ensuring that the needs and characteristics of those inmates are considered when the Legislature makes policy decisions affecting correctional

CHAPTER 5

RELEASE

The vast majority of the women imprisoned in Montana are looking forward to the day that they are released from confinement and allowed to start over and rejoin their families. The last question asked of the women who were surveyed was "What are your plans on release?" Here is a collection of the responses.

SURVEY RESPONSES -- PLANS ON RELEASE

"Go to college and get my kid back."

"Get a job, earn enough money to leave Montana and start over."

"Buy a small home, get a car, get a job, attend college, find someone special to make a future with."

"Get a job, stay sober, I DO NOT WANT TO COME BACK."

"Be a productive member of society, work hard, obey laws, and appreciate freedom."

"Go to college and stay out of prison."

"To bond with my family and live my life in the healthy way I have learned."

"Go home, stay sober."

"Live a clean, healthy life."

"Become an advocate for women."

"Get a job and raise my child."

"Stay out of prison and be a better person."

"Stay clean, get a job, go to school."

"Continue my education."

"Go to college, participate in aftercare."

"Secure stable employment, continue alcohol counseling, volunteer in the community, help my parents, be debt-free."

"To be a better, sober, responsible, loving parent."

"Find a job to help the family, go to school."

"Get a job and technical training, move closer to my children."

"Start a business, take care of my parents."

"Get a job, stay away from drugs, love my husband."

"Obey the law, be productive."

"Stay clean and sober, get involved with my kid's school, stay on a schedule, be a better parent, stay healthy."

"Help other women find jobs."

"Own a business, attend AA meetings."

CONCLUSION

An inmate's life before she was incarcerated and her life once she is in prison represent the two sides of the coin that must be considered when studying the topics of the increase in women's prison populations and women's prison issues. How an inmate ended up in prison and how she is treated while she serves her sentence are like two different dishes in the same meal, and each must be approached differently.

Although it has a responsibility to minimize the number of released inmates who reoffend, the prison is not responsible for the fact that the population is increasing. Prisons are designed to deal with individuals once they have already been through much of the criminal justice system. Montana law specifies that the state's prisons must punish the offender, protect the public, and encourage and provide opportunities for the offender's self-improvement. Corrections officials are faced with how to maintain parity between the male and female institutional populations, while recognizing and providing for the marked differences between the backgrounds and behavior of the genders. Throw into the mix the security and public safety elements that must be a priority in any correctional setting, and the challenges become evident. As the entity that appropriates money to pay for incarcerating offenders, it is appropriate for the Legislature to examine prison programs and policies and make recommendations on how the funds are allocated within the system. A legislative body may also recommend changes to the laws that impact prison operations or prison populations and may direct an agency to effect changes to the system.

The path that a woman takes that leads her to prison is a much muddier issue for a legislative body to handle. It can begin in the womb if her mother drank while she was pregnant. It often involves childhood

sexual, physical, and verbal abuse. It may involve depression or other mental illnesses and her own use of drugs and alcohol. In the case of the Native American women, it may even involve an entire culture's loss of identity.

The LJAC struggled with these two different aspects of the study and, as time allowed, explored both.

Although it became somewhat sensationalized, what news magazine anchor Deborah Norville was attempting to do when she spent her week in "the toughest jail in America" was to bring attention to this smaller and quieter segment of the correctional population that most of us try not to think about. That is the least of what the HJR 37 study accomplished for the Legislature. In this new era of term limits and high legislator turnover, it will become more important than ever for members of interim committees to build solid foundations on which to base future policy decisions. It is the sincere hope of the LJAC that this study has provided such a foundation.

Senate Joint Resolution No. 14

Study of Sentencing Statutes, Data Information Collection and Management, and Related Issues

Prepared by _____

Susan Fox

INTRODUCTION

Montana has an indeterminate sentencing structure for criminal offenses, one in which the Legislature sets broad parameters in statute in the form of sentence ranges for each offense (e.g., arson, 0 to 20 years). Statute allows a judge to defer or suspend portions of a sentence, to require imprisonment or alternatives for all or a portion of the sentence, or to add conditions for supervision and release. The judge renders the sentence based on the conviction or the plea of the offender. The amount of time spent in prison can be determined in the sentence itself if an offender is ineligible for parole or by the paroling authority, which in Montana is the Board of Pardons and Parole. For those offenders sentenced for offenses committed prior to January 30, 1999, credit is given for good behavior towards parole eligibility and release. An indeterminate sentencing structure allows discretion at various points in the system, which historically was intended to allow authorities to determine when an offender was sufficiently rehabilitated to return to society.

Since the 1970s, seemingly contradictory concerns of sentence disparities and discrimination and, more recently, greater interest in retribution and crime control both brought about limits to discretion. Mandatory minimums and certain sentence enhancements limited judicial

and parole discretion. Two-strikes and three-strikes laws also limited judicial discretion and, further, limited prosecutorial discretion and flexibility and created additional pressures on the courts as options for defendants were reduced. Montana retains the indeterminate structure but has made numerous changes in statute over the years that limit discretion, emphasize retribution, and place greater demands on the correctional system in a piecemeal and patchwork approach.

In the last 12 years, there have been at least four separate entities in Montana that have studied issues relevant to sentencing and release, including two previous sentencing studies. Each entity recommended some statutory changes, and three out of four recommended additional study. Some of the need for additional study was driven by the lack of accessibility and availability of information. Multiple criminal justice databases residing in various state and local agencies and courts have made and will continue to make it difficult to compile useful information in a timely manner and to maintain consistency over time without some coordination and integration.

The LJAC built upon the work of the most recent study conducted by the Montana Sentencing Commission (Commission), which was formed in 1995 through legislation requested by the Department of Corrections and Human Services (Ch. 306, L. 1995), precursor to the current DOC. After 18 months of study, the Commission recommended continued work to develop an accurate database of criminal justice information and criminal sentencing practices, to determine what impacts sentencing laws and practices have on the state's criminal justice system and correctional resources, and to evaluate Montana's sentencing laws in order to achieve a simpler, more understandable sentencing system that

results in consistent, effective, and fair administration of laws. The 1997 Legislature did not reauthorize the Commission or any subsequent concentrated study of sentencing and release practices. A Correctional Standards and Oversight Legislative Interim Committee during the 1997-98 interim made recommendations regarding criminal procedure in Title 46, MCA, but no further work regarding Title 45, MCA, was accomplished.

SJR 14 was the result of the recognition that the effort to review sentencing statutes needed to be accomplished, but the study was no exception to previous experience. The Legislative Council assigned SJR 14 to the LJAC. The project was much more involved than the resources allowed. However, this report entails the work that was accomplished towards this effort and explains why the LJAC recommends additional study.

Senate Joint Resolution No. 14

The resolution outlined the areas for study. The interim committee was to:

1. develop a felony crime seriousness ranking that provides for public safety and appropriate restoration of the victim and that can serve as the basis of a rational sentencing policy in Montana;
2. review the sentencing statutes in Titles 45 and 46, MCA, and statutes in other titles of the MCA that contain criminal sentences and determine the extent to which the current sentence ranges and penalties conform

to Article II, section 28, of the Montana Constitution, the correctional and sentencing policy in section 46-18-101, MCA, and the crime seriousness ranking;

3. assess the impact of mandatory minimum sentences, truth-in-sentencing laws, two-strikes and three-strikes laws, and the elimination of good time credits on the criminal justice system, including the impacts on sentencing practices and correctional resources in the state;

4. consider requiring a period of mandatory postrelease supervision for any offender who is incarcerated and estimate the impact of that policy on the parole resources of the state;

5. examine the effect of allowing deferred sentences for crimes that must be committed two, three, or four times before reaching felony status;

6. review the provisions for and the use of sentence enhancements;

7. examine the current statutory provisions for sentence review by the Sentence Review Board of the Supreme Court and assess the adequacy of those provisions and of the resources available for sentence review;

8. review the use of correctional resources in the state, including but not limited to intermediate sanctions, such as probation, intensive supervision, and prerelease centers, as well as the use of parole and the amount of time served in prison or jail out of the total sentence imposed;

9. report the results of its work and recommend to the 57th Legislature changes needed in Titles 45 and 46, MCA, to achieve a consistent, effective, and rational sentencing system and to maximize the use of available correctional resources in the state, including intermediate sanctions, minimum security correctional facilities, and sentence review resources; and

10. review and monitor the implementation of databases that involve court and criminal justice data to ensure that integration and cooperation is occurring and that the databases being developed will provide the Legislature with information on sentencing practices, sentence disparities, offender populations, the use of correctional facilities, intermediate sanctions, parole, and other information needed for the Legislature to make informed policy decisions on the state's correctional and sentencing statutes and their fiscal impact on corrections and on funding for the criminal justice system and corrections programs.

Study Plan and LJAC Activities

There are five areas that can be derived from the study resolution: correctional and sentencing policy; criminal justice data; statutory analysis; postsentencing issues; and implications for criminal justice and correctional resources. A study plan was developed on these areas and was presented to the LJAC on September 17, 1999. The following is a brief explanation of the proposed study and the status of each area.

I. Correctional and sentencing policy is set forth in the constitution and in statute. Article II, section 28, of the Montana Constitution delineates the criminal justice policy of the state and states, "Laws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims." Section 46-18-101, MCA, contains the correctional and sentencing policy.

A critical element to explore was understanding the public policy issues that are imbedded in the constitutional and statutory principles. The LJAC reviewed the constitution and the statutes but made no recommendations on whether or not they mesh with and are consistent with a rational public policy. It was apparent from testimony that public safety is the primary goal of the correctional and parole systems. Further analysis should be done in the context of any future study because it bears on the other areas of how the statutes follow the policy and provide direction for sentencing and release decisions with corresponding implications for the use of criminal justice and correctional resources.

II. Criminal justice data issues that the LJAC was interested in included monitoring the status, development, and implementation of information management systems in the courts, between justice agencies, and in

corrections. The computer databases that exist within state agencies dealing with court, criminal justice, and corrections data are as follows:

- State Court Administrator--On December 10, 1999, the LJAC received information and demonstrations of the two data systems:
 1. Limited Court Judicial Management System (LCJMS) (Justice Court); and
 2. Judicial Case Management System (JCMS) (District Court).
- Department of Corrections--On August 17, 2000, the LJAC received a demonstration of the alpha phase of the PRO-Files database. PRO-Files is a new database that is extracting data from the current database, the ACIS, and is being developed in phases from November 2000 and is currently scheduled through May 2002, at which time the ACIS will be retired.
- DOJ--The LJAC received an update of the Criminal History Record System (CHRS) on December 10, 1999.
- The DOJ is the lead agency in the Criminal Justice Information Services (CJIS) Project. An interagency Advisory Group has been developed and has adopted a mission statement: "to develop and maintain a criminal justice information system that protects the privacy rights of citizens, maintains the security of information, allows for cost-effective information sharing, and avoids unnecessary duplication". The statement of operational requirements established by the Advisory Group is: "Every Montana criminal justice agency shall be able to determine the Montana correctional status within two minutes, with a status

currency of 24 hours and to be able to obtain the felony Montana criminal history record of a person who has one, within 4 minutes, with a history currency of 24 hours and a national fingerprint check within 2 hours." A memorandum of understanding has been entered into by the Office of the Governor, the DOJ, and the Montana Supreme Court, and other participating agencies include the DOC and the Department of Public Health and Human Services. The Sentencing Study Subcommittee met on August 1, 2000, and received an update of the project's progress.

- Department of Public Health and Human Services--The Child and Adult Protective Services (CAPS) System is used primarily for managing juvenile out-of-home placement funds and provider reimbursement.

The DOJ and DOC hope to exchange some criminal justice information by the fall of 2000. A pilot program of the CJIS Project was being developed over the summer to work with Lewis and Clark and Glacier Counties. An electronic fingerprint system is up and running through eight state and local correctional and detention facilities across the state. The LJAC received information on these respective databases. Although progress is being made, there have been delays in the development and integration of these databases for information sharing, research, and analysis. From the information gathered to date, it is not possible to evaluate the quality of the data being gathered, the extent to which the data systems are being integrated, and whether the resources that have been invested have resulted in the most appropriate use of technology. Also, the statutes regarding public and confidential criminal justice data may not reflect the recent case law rendered in this area;

however, they are still being followed by some agencies in the development of their systems and in providing information to the public. The current staff and PRO-Files plan changes within the DOC have major ramifications on integration with the DOJ and other agencies. Further development and integration should be monitored very closely.

Future evaluation of the quality and integration of the various database systems could be accomplished by requesting an audit survey or a performance or electronic data processing audit by the Legislative Audit Division of the agencies involved in the criminal justice information system. Any analysis of the statutes must include determining whether the policy directives clearly articulate the administrative and legislative needs for data and consideration of enacting legislation on criminal justice information to bring statutes into compliance with Montana case law. The LJAC was presented with a copy of the DOC's report "Is There Such a Thing as Confidential Criminal Justice Information?" that provides information on the case law that is involved. The LJAC has received testimony from the DOJ stating that the statutes have been its guide in developing the system, yet the statutes may not reflect current case law.

III. Statutory analysis involved laying the foundation for the analysis of the sentencing and criminal procedure statutes in comparison to a crime seriousness ranking and of specific types of statutes. A crime seriousness ranking was developed by the 1995 Commission in its study and then used to set out sentencing guidelines. The Commission had spent significant time in this effort and based its ranking on the nature and degree of harm caused or likely to be caused by the offense, the

culpability of the offender, and the rights of the victim⁴⁶. The LJAC had no desire to revisit sentencing guidelines, but found the ranking a useful tool in analyzing statutes.

The LJAC assessed the crime seriousness ranking developed by the 1995 Commission at its February 13, 2000, meeting. The ranking was reviewed and adopted by the LJAC at its August 17, 2000, meeting. Because the LJAC did not have the time required to accomplish the tasks, it did not update the ranking with additional sentences enacted since 1995 or with statutes that the 1995 Commission had omitted. However, the LJAC did revise the ranking by removing the apportionment of the property crimes between crime seriousness rankings that the Commission had assigned using a continuum of dollar value of the damage of the offense and assigning the property offense to the first level in which it appeared. Once that exercise was accomplished, the LJAC reduced the ranking to nine levels. Only the offenses that the Commission had reviewed were included, and in order to provide that additional information, the LJAC adopted proposals to develop other tables for use by the Judiciary Committees, including the felony statutes outside of Title 45 and misdemeanors that rise to the level of a felony on a second or subsequent offense. (See Work Products.)

IV. Postsentencing issues are those that rise after an offender is convicted and sentenced. The traditional avenues of appeal and sentence review are available to the offender. The offender may face authorities that determine an offender's actual release from prison and

⁴⁶ From "Montana Sentencing Commission: Report to the Montana 55th Legislative Assembly", January 1997.

supervision after release, either under probation or parole, based on the sentence and other factors, such as behavior in prison or fulfilling conditions for eligibility for parole. Sentenced individuals may appeal their District Court sentences to the Sentence Review Board, which is a three-judge panel of District Court Judges who review the sentences rendered and make a decision regarding whether to uphold the sentence, reduce the sentence, or increase the sentence. Montana has a Board of Pardons and Parole independent of, yet administratively attached to, the DOC, which employs approximately 85 Probation and Parole Officers around the state⁴⁷. The LJAC did not get to this phase of the study, but received a report about a performance audit being performed on the Board of Pardons and Parole by the Legislative Audit Division. The final audit report was expected in the late fall of 2000, and the LJAC hoped to review it prior to the legislative session. The report also may provide valuable information for future study.

V. The issue of resources is one of the major issues that prompts sentencing studies, i.e., the amount or cost of the resources consumed in the administration of justice at the local, state, and federal levels in all three branches of government. No part of the criminal justice or corrections system recruits offenders or controls the input, but criminal justice and corrections have not relied heavily on evaluation or analysis of success by much more than recidivism figures. Prevention, treatment, and rehabilitation are goals that can compete with or enhance other correctional goals, such as public safety, punishment, and retribution. The costs can be looked at in the bottom line of expenditures and necessary revenue or can be seen in the bigger picture of safe and

⁴⁷Probation is supervision while under a deferred or suspended sentence, and parole is a period of supervision after release from a correctional institution.

healthy communities. The LJAC also did not reach this phase of the study. The lack of criminal justice data is an impediment to analysis of resources in terms of inputs, outcomes, and results. However, as the criminal justice databases become more operational, it is hoped that information relevant to this analysis will be developed and used in the analysis of the costs and effectiveness of the criminal justice and corrections systems.

LJAC Sentencing Study Recommendations

On June 19, 2000, a Sentencing Study Subcommittee of the LJAC was appointed consisting of: Senator Sue Bartlett (presiding officer), Senator Linda Nelson, Senator John Bohlinger, and Representative Jim Shockley. The Subcommittee met on August 1, 2000, and formulated recommendations for the full LJAC. The LJAC considered these recommendations on August 17, 2000.

The LJAC adopted the Judiciary Committee Analysis Tool and Reference Guide (see Work Products). Components of this recommendation include that the tool be used:

- 1. during the 2001 Legislative Session to assist the House and Senate Judiciary Committees in the analysis of proposals for defining new crimes or proposals to amend current sentencing statutes;**
- 2. by the LJAC and any other appropriate entities to further analyze the criminal sentencing statutes. Analysis could include mandatory minimums, inequities and anomalies of sentences within crime seriousness rankings, and other analyses regarding court and correctional resources.**

3. The LJAC recommended that the Code Commissioner include a cross reference in Title 45, MCA regarding criminal sentences that are not changes made in the 2001 Legislature and other references in Title 45, MCA. There are already cross references in section 45-2-101, MCA, and that list could be expanded to include "other criminal

The LJAC recommended to the Legislature that a study committee be formed and charged with the revision of the criminal statutes with a goal to simplify and address any inequities or anomalies. The following persons were identified as stakeholders and should be a part of the process: County Attorneys, defense counsel, District Court Judges, staff of the DOJ and DOC, members and staff of the Board of Pardons and Parole, Probation and Parole Officers, members of law enforcement, faculty from the University of Montana-Missoula Law School, victims, the public, and legislators. The LJAC recommended that a bill be drafted to establish a study committee, including an appropriation to finance it based on the scope of the study outlined and the staffing level required. (The official bill draft number for the 2001 Session is LC 117.) The LJAC directed the DOJ to be the agency to which the study is assigned. If the Committee bill were to not pass, the LJAC recommended that the LJAC continue to pursue the study as a main study priority for the 2001-02 interim.

There were other areas in SJR 14 that were not studied and that remain issues in need of review by either an entity formed at the direction of the legislation developed in recommendation #3 or by the LJAC. The topics for future study include:

- update work products and analyze the current sentencing and criminal procedure statutes found in Titles 45 and 46, MCA;
- compare the updated products and statutes with the adopted crime seriousness ranking to determine how close

the statutes reflect the ranking and if any change is recommended;

- build on the progress accomplished by the 1997-98 Correctional Standards and Oversight Committee that culminated in revisions to Title 46, chapter 18 (Ch. 52, L. 1999), MCA, that were based on an analysis that sought to streamline the codes and to eliminate redundancies and conflicts;
- analyze the different types of sentences in statute and legislative action on those statutes over the past 10 years. Issues that should be included are mandatory minimums, truth-in-sentencing, two and three strikes, the effects of the elimination of good time credits, deferred sentences, sentencing enhancements for use of certain weapons or ammunition or for persistent felony offenders, intermediate and alternative sanctions, and commitment to the DOC. An analysis of sentence types could include information on what the literature offers in regard to the effects of different types of sentences on criminal justice and correctional resources.
- study the Sentence Review Board and the adequacy of its resources. Recent Montana Supreme Court decisions regarding representation of the offenders in the sentence review process may have ramifications on an already burdened system. Alternatives to the current system could

be explored as well as the impacts on the court system of those alternatives.

- study the parole system. Some offenders receive an early release from their prison sentence by the Board of Pardons and Parole under certain statutory restrictions. Not all offenders serve time on parole or under any supervision. Offenders who did not have good behavior in prison, many sex offenders, or offenders who were declared ineligible for parole by the sentencing judge are sometimes discharged and leave prison under no supervision once their sentence is served. Therefore, there is no method of tracking their whereabouts if they are not registered as a sexual or violent offender. A mandatory period of supervision is an alternative practice that merits research. Some states have abolished parole and use other methods of supervision. The Board of Pardons and Parole is administratively attached to, yet practically separate from, the DOC for many legitimate reasons. Yet, without understanding and some coordination regarding expectations and program resources between the two agencies, correctional resources may not be used as efficiently and effectively as possible. This relates to the correctional and sentencing policy in the Montana Constitution and the statutes and whether or not the Board of Pardons and Parole is guided by the same principles and works in concert with the DOC towards these ends.

- study length of stay in prison. An indeterminate sentencing system with discretion at many points as in Montana can lead to longer sentences or lengths of stay than are found in other states. If incapacitation is the primary goal, longer sentences may be appropriate, but if there are other goals of rehabilitation or a balance between public safety and efficient use of resources, this may be an important issue to explore.
- determine the actual level of resources that the state has in the criminal justice and corrections systems and how the actions of the players in the respective systems determine the need for resources. As the criminal justice, court, and correctional systems are inextricably intertwined, they also stand separate and independent of one another, and the resources are variable in each system. When prison overcrowding occurs, more resources may be expended in that part of the system, but that may compromise the ability for courts and other criminal justice agencies to have sufficient resources for prevention, supervision, and the processing of criminal cases. Data is a vital link to seeing the bigger picture in regard to resources, but the ability to access and use data depends on the timely development and quality of data, which is still in the initial stages. Knowing and understanding the effects of certain types of sentences on correctional resources and using that information to make major policy changes are a major undertaking. An analysis of postsentencing practices will

also contribute to understanding the use of and impact on resources.

WORK PRODUCTS

The following work products resulted from the SJR 14 study: Judiciary Committee Title 45 Sentencing Statutes Reference Guide, Analysis Tool, and Appendix.

**JUDICIARY COMMITTEE
TITLE 45 FELONY SENTENCING STATUTES
ANALYSIS TOOL AND REFERENCE GUIDE**

By Crime Seriousness Ranking, Crime, MCA Reference, Description, and
Sentence Range
(not including misdemeanors, drug offenses, three strikes, fines, or other
conditions)

This document contains the Judiciary Committee Title 45 Sentencing Statutes Analysis Tool and a companion reference guide. The Introduction explains what is included and not included in the Analysis Tool and Reference Guide. The Reference Guide provides a description and statutory reference for each crime listed in the Analysis Tool.

INTRODUCTION

In the Analysis Tool, the Montana Code Annotated (MCA) Title 45 felony sentencing statutes are organized by the Crime Seriousness Ranking (CSR) developed by the 1995 Montana Sentencing Commission (Commission)⁴⁸. The Commission had based its ranking on the nature and degree of harm caused or likely to be caused by the offense, the culpability of the offender, and the rights of the victim⁴⁹. The Law, Justice, and Indian Affairs Interim Committee (LJIAC) adopted this tool as a starting point for reference by legislators during the 2001 Legislative Session and for future analysis of criminal statutes. The Analysis Tool is a snapshot of the state of the 1999 statutes governing Montana's indeterminate sentencing system. The snapshot is intended to reveal any inequities or anomalies that can occur in a system that is amended on a

⁴⁸ The Montana Sentencing Commission adopted a 10-level scale and had apportioned property crimes by different values, resulting in multiple listings of the same property crime. The LJIAC adopted the tool without the monetary value levels and placed the property crimes in the first level in which the crimes appeared in the scale, resulting in the renumbering of the tool that now contains nine levels.

⁴⁹ From *Montana Sentencing Commission: Report to the Montana 55th Legislative Assembly*, January 1997.

regular basis during biennial legislative sessions without a mechanism or entity to review and analyze the establishment of new criminal offenses or amendments to existing statutes.

The Analysis Tool and Reference Guide are intended to be used by the Senate and House Judiciary Committees during legislative sessions when deliberating on any legislation proposing new criminal offenses or sentences or changes to existing criminal statutes and as a tool for the LJAC or other entities to analyze criminal sentencing statutes in the MCA.

The Analysis Tool and Reference Guide list the offenses in Title 45, MCA, that may rise to the level of a felony on a first conviction by virtue of the sentence imposed upon the conviction: death or imprisonment in a state prison for a term exceeding 1 year (45-2-101(22), MCA). For many of these offenses, a sentence of less than 1 year may be imposed, and by definition, the offense would then be a misdemeanor.

The Analysis Tool and Reference Guide do not contain over 500 misdemeanor offenses "for which the sentence imposed upon conviction is imprisonment in a county jail for a term or a fine, or both, or for which the sentence imposed is imprisonment in a state prison for a term of 1 year or less" (45-2-101(41), MCA).

The Analysis Tool and Reference Guide do not include drug offenses (Title 45, chapters 9 and 10, MCA) because the LJAC used as its basis the work of the 1995 Commission, which was pursuing drug offenses separately. The LJAC did not get beyond the previous work accomplished by the Commission, but a listing of the felony drug offenses is included in the Appendix. The "two-strikes and three-strikes" provisions in 46-18-219 and 46-18-220, MCA, that were enacted

in 1995 and that increase the penalties for some of the offenses under certain circumstances are not included in this document.⁵⁰

There are also miscellaneous charges and other conditions that may be imposed during sentencing that are not included. All of these other criminal offenses and sentencing conditions are part of Montana's complicated indeterminate sentencing system, and further analysis is warranted for a thorough understanding. The Analysis Tool and Reference Guide are merely a beginning foundation.

The Appendix lists:

- the felony offenses that were omitted by the Commission or that have been enacted since 1995 and are not included in the Analysis Tool or Reference Guide;
- over 80 felony offenses that are dispersed throughout titles other than Title 45, MCA (i.e., fish, game, and livestock violations, elder abuse, driving under the influence, environmental and financial violations, etc.);
- a list of offenses that rise to the level of a felony on a second or subsequent conviction (i.e., partner and family member assault, indecent exposure, etc.); and
- a list of the Title 45, MCA, felony drug offenses.

The Analysis Tool, Reference Guide, and Appendix were compiled using the 1999 MCA and may not be an exhaustive list based on the vagaries of statutory language dealing with criminal felony offenses. It is the

⁵⁰Two-strikes and three-strikes laws in Montana require that an offender who is convicted of deliberate homicide, aggravated kidnapping, sexual intercourse without consent, sexual abuse of children, or ritual abuse of a minor and who was previously convicted of one of the aforementioned offenses (two-strikes) or convicted of a third offense (three strikes) of one of the above offenses or of mitigated deliberate homicide, aggravated assault, kidnapping, or robbery must be sentenced to life in prison or to death, if applicable.

intent that this tool be updated and refined each interim by the LJAC and by other entities that analyze criminal statutes.

JUDICIARY COMMITTEE TITLE 45 SENTENCING STATUTES ANALYSIS TOOL

CSR	OFFENSE	MIN SENT	MAX SENT	LIFE	DEATH	SEE ALSO CSR
I	Deliberate Homicide	10	100	L	D	
II	Aggravated Kidnapping	2	100	L	D	III
	Mitigated Deliberate Homicide	2	40			
III	Aggravated Assault (serious bodily injury)	2	20			
	Sexual Intercourse Without Consent (victim < 16)	4	100	L		IV
	Sexual Intercourse Without Consent (multiple offenders)	5	100	L		IV
	Sexual Intercourse Without Consent (2nd offense)			L	D	IV
	Incest (elements sexual intercourse without consent)	0	100	L		V, VII
	Incest (sexual intercourse without consent) (victim < 16)	4	100	L		V, VII
	Sexual Abuse of Children	0	100	L		VI
	Sexual Abuse of Children (victim < 16)	4	100	L		VI
	Aggravated Promotion of Prostitution (victim < 18, dependent)	0	20			VI
	Aggravated Kidnapping (no serious bodily injury)	2	10			II
IV	Sexual Intercourse Without Consent	2	100	L		III
	Assault on a Peace Officer or Judicial Officer	2	10			
	Mistreating Prisoners	0	10			
	Kidnapping	2	10			
	Robbery	2	40			
	Aggravated Burglary	0	40			
	Escape (use or threat of force, violence, weapon)	0	20			V
	Arson	0	20			
	Possession of a Deadly Weapon by a Prisoner	5	15			

CSR	OFFENSE	MIN SEN T	MAX SENT	LIFE	DEATH	SEE ALSO CSR
	Rioting (in prison or jail)	1	5			
	Incitement to Riot (in state correctional facility)	1	5			
V	Negligent Homicide	0	20			
	Criminal Endangerment	0	10			
	Assault With a Weapon	0	20			
	Assault Upon a Minor (victim < 14, offender 18+)	0	5			
	Burglary	0	20			
	Sexual Assault	2	100	L		
	Incest (sexual assault)	0	100	L		III, VII
	Incest (sexual assault) (victim < 16)	4	100	L		III, VII
	Escape (no use, threat of force, violence, weapon)	0	10			IV
VI	Aiding or Soliciting Suicide	0	10			
	Aggravated Promotion of Prostitution	0	20			III
	Intimidation	0	10			
	Sexual Abuse of Children (possession of visual or print medium)	0	10			III
	Criminal Mischief	0	10			
	Desecration of Capitol, Place of Worship, Cemetery, Public Memorial	0	10			
	Theft	0	10			
	Failure to Return Rented or Leased Personal Property	0	10			
	Unlawful Use of a Computer	0	10			
	Unauthorized Acquisition or Transfer of Food Stamps	0	10			
	Medicaid Fraud	0	10			
	Issuing a Bad Check	0	10			
	Deceptive Practices	0	10			
	Forgery	0	20			

CSR	OFFENSE	MIN SENT	MAX SENT	LIFE	DEATH	SEE ALSO CSR
	Illegal Branding or Altering or Obscuring a Brand	0	10			
VII	Possession of a Destructive Device	0	10			
	Possession of Explosives	0	20			
	Possession of Silencer	5	30			
	Incest (marries or cohabits only)	0	100	L		III, V
	Incest (marries or cohabits only) (victim < 16)	4	100	L		III, V
	Aggravated Nonsupport	0	10			
	Aggravated Interference With Parent-Child Contact	0	18 mos			
	Custodial Interference	0	10			
	Bribery in Official Political Matters	0	10			
	Threats and Other Improper Influence in Official and Political Matters	0	10			
	Perjury	0	10			
	Tampering With Witnesses and Informants	0	10			
	Tampering With or Fabricating Physical Evidence	0	10			
	Bail Jumping	0	10			
	Privacy in Communications	0	5			
VIII	Carrying a Concealed Weapon	0	5			
	Impersonation of a Public Servant	0	5			
IX	Causing Animals to Fight	1	5			

HOW THIS REFERENCE GUIDE IS ORGANIZED

1. Level

(LEVEL II)

The levels represent the crime seriousness ranking assigned by the Commission to the crimes listed within each Level. The Levels are arranged from most serious (Level I) to least serious (Level IX), based on the Commission's criteria.

2. Description of characteristics

(Offenses against the person: violent, used or threatened physical force with victim, or victim death with mitigating circumstances)

This information summarizes the elements of the offenses within each crime seriousness level. Criminal statutes in Title 45, MCA, are organized into chapters based on the types of crime, i.e., crimes "against the person", crimes against "property", crimes against "public administration", and crimes against "public order".

3. Listing by crime or offense name

(Aggravated Kidnapping)

4. Listing by MCA section

(45-5-303)

This is the section of the MCA in which this crime can be found.

Below the name of the crime and the MCA section is a summary of the crime as it is described in the MCA.

5. Including cross references

(See also Level III)

This note appears at the end of the summary for some crimes because some crimes appear in more than one Crime Seriousness Level. When this happens, the elements of the crime will be different in each level. For example, Aggravated Kidnapping also appears in Levels II and III, but in the Level III offense, the offender must have voluntarily released the victim alive, in a safe place, and not suffering from serious bodily injury (as that term is defined in the criminal law).

In addition, the sentence range for a crime that appears in different levels may be different. For example, the sentence range for Level II Aggravated Kidnapping is 2-100 years, Life, or Death, while the sentence range for Level III Aggravated Kidnapping is 2-10 years.

6. Including sentence range

(2-100, L, D)

This information identifies the sentence range (2-100 years) that a judge may impose when someone is convicted of that crime. "L" stands for life imprisonment, and "D" indicates that the death penalty may be imposed for this crime.

TITLE 45 FELONY SENTENCING STATUTES REFERENCE GUIDE

LEVEL I:

Description of characteristics:

- This offense is against the person: violent, victim death.

Deliberate Homicide

45-5-102

A person commits this offense if the person causes the death of another human being or in the process of attempting or committing a forcible felony, causes the death of another human being.

(10-100, L, D)

LEVEL II:

Description of characteristics:

- Offenses are against the person: violent, used or threatened physical force with victim, or victim death with mitigating circumstances.

Aggravated Kidnapping

45-5-303

A person commits this offense if the person restrains another person to hold that person for ransom or as a hostage; to facilitate commission of any felony or flight; to inflict bodily injury on or to terrorize the victim; to interfere with governmental or political function; or to hold a person for a position of involuntary servitude (unless the offender has voluntarily released the victim alive, in a safe place, and not suffering from serious bodily injury.) (*See also Level III*)

(2-100, L, D)

Mitigated Deliberate Homicide

45-5-103

A person commits this offense if the person purposely or knowingly causes the death of another human being while under extreme mental or emotional stress for which there is a reasonable explanation. (2-40)

LEVEL III:

Description of characteristics:

- Offenses are against the person: two violent (one with serious bodily injury (sbi), one without causing sbi), three sexual, one against the family.
- Aggravated promotion of prostitution is not considered a sex crime by the FBI and in Montana is an offense against the family. As an element of the offense in this level, the victim is a dependent of the offender.

Aggravated Assault

45-5-202(1)

A person commits this offense if the person causes *serious bodily injury* to another. (2-20)

Sexual Intercourse Without Consent

45-5-503

(1) A person commits this offense if the person has sexual intercourse (any penetration) with another without that person's consent. (*See also Level IV*) (2-100, L)

OR

(3) (a) if the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury on anyone in the course of committing sexual intercourse without consent;

(4-100, L)

OR

(3) (b) if two or more offenders are convicted of the offense with the same victim in an incident in which each offender was present at the location of the offense . . . and each offender could have reasonably known of the other's offense; (5-100, L)

OR

(3) (c) if the offender was previously convicted of this offense (L, D)

Incest

45-5-507

A person commits this offense if the person marries, cohabits with, or has sexual intercourse or sexual contact with an ancestor, descendant, brother or sister (whole or half), or stepson or stepdaughter, if any of the factors listed under Sexual Intercourse Without Consent are present. (*See also Level IV, and IV*) 16: 4-100, L)

Sexual Abuse of Children

45-5-625(1)(a), (b), and (c)

A person commits this offense if the person knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated;

OR

The offender knowingly photographs, films, videotapes, develops, or duplicates the photographs, films, or videotapes or records a child engaging in sexual conduct;

OR

The offender persuades, entices, counsels, or procures a child to engage in sexual conduct, actual or simulated.

(See also Level VI)

(0-100, L; victim < 16: 4-100, L)

Aggravated Promotion of Prostitution

45-5-603(1)(b) and (c)

A person commits this offense if the person purposely or knowingly:

(1) (b) promotes prostitution of a child under the age of 18 years, whether or not the person is aware of the child's age;

OR

(1) (c) The offender promotes the prostitution of one's spouse, child, ward, or any person for whose care, protection, or support the offender is responsible. (See also Level VI)

(0-20)

Aggravated Kidnapping

45-5-303

(The offender voluntarily released the victim alive, in a safe place, and *not suffering from serious bodily injury*.) A person commits this offense if the person restrains another person to hold that person for ransom or as a hostage; to facilitate commission of any felony or flight; to inflict bodily injury on or terrorize the victim; to interfere with governmental or political function; or to hold a person for a position of involuntary servitude. (See also Level II)

(2-10)

LEVEL IV:

Description of characteristics:

- Five are considered offenses against the person: four violent, one sexual.

- Aggravated burglary could be considered violent because elements of the crime include use of a weapon or bodily injury. Burglary is traditionally categorized as an offense against property.
- Escape is an offense against the public administration, but an element of the offense described in this level is the use of force or physical violence or use of an actual or simulated weapon.
- Arson is considered an offense against property, although destruction and placing another person in danger are elements of the offense.
- Possession of a deadly weapon, rioting, and inciting riot are offenses against the public order; however, rioting and inciting riot may be committed only by inmates under state or county jurisdiction.

Sexual Intercourse Without Consent 45-5-503(1)

A person commits this offense if the person has sexual intercourse without consent with another person.

(See also Level III) (2-100, L)

Assault on a Peace Officer or Judicial Officer 45-5-210

A person commits this offense if the person causes bodily injury to a peace officer or a judicial officer. (2-10)

Mistreating Prisoners 45-5-204

A person commits this offense if the person assaults or injures a prisoner or intimidates, threatens, endangers, or withholds reasonable necessities from the prisoner to obtain a confession or violates any civil right of a prisoner. (0-10)

Kidnapping 45-5-302

A person commits this offense if the person restrains another person by holding the person in isolation or threatening physical force. (2-10)

Robbery 45-5-401

A person commits this offense if the person in the course of committing a theft inflicts or threatens to inflict bodily injury or commits or threatens to commit any felony. (2-40)

Aggravated Burglary

45-6-204(2)

A person commits this offense if the person knowingly enters or remains unlawfully in an occupied structure to commit an offense therein; and (1) in the course of entry, committing the offense, or flight is armed with explosives or a weapon; or (2) purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury on another. (0-40)

Escape

45-7-306(3)(a)

(Situations in which the detained person uses or threatens to use force, physical violence, a weapon, or a simulated weapon.) A person commits this offense when the person knowingly or purposely eludes official detention or fails to return to official detention following temporary leave granted for a specific purpose or is in a county work program and fails to appear for work. (*See also Level V*) (0-20)

Arson

45-6-103

A person commits this offense if the person damages or destroys a structure, vehicle, personal property that exceeds \$1,000 in value, crop, pasture, forest, or other real property: (a) that is property of another without consent; or (b) that the person owns or has a possessory interest in, with the purpose of obtaining a pecuniary interest or gain through fraud or deception. A person commits arson if the person places another person, including a firefighter, in danger of death or bodily injury. (0-20)

Possession of a Deadly Weapon by a Prisoner

45-8-318

A person commits this offense if the person is imprisoned in the state prison, a jail, a youth detention or youth correctional facility, or while in transit to or from such institutions and possesses a weapon. (5-15)

Rioting

45-8-103(3)

A person commits this offense if the person engages in an act of violence while incarcerated in the state prison or a jail. (1-5)

Incitement to Riot

45-8-104(3)

A person commits this offense if the person engages in conduct that encourages other persons to riot while incarcerated in a state correctional facility. (1-5)

LEVEL V:

Description of characteristics:

- Six are offenses against the person: three violent, two sexual; criminal endangerment is creating a substantial risk of death or serious bodily injury.
- One offense is against property.
- Escape is an offense against the public administration, and in this level, no force is used.

Negligent Homicide

45-5-104

A person commits this offense if the person negligently causes the death of another human being. (0-20)

Criminal Endangerment

45-5-207

A person commits this offense if the person engages in conduct that creates a substantial risk of death or serious bodily injury to another. (0-10)

Assault With a Weapon

45-5-213

A person commits this offense if the person causes bodily injury or reasonable apprehension of serious bodily injury to another by use of a weapon. (0-20)

Assault Upon a Minor

45-5-212

A person commits this offense if a person 18 years of age or older causes bodily injury to a victim less than 14 years of age. (0-5)

Burglary

45-6-204

A person commits this offense if the person enters or remains unlawfully in an occupied structure with the purpose to commit an offense in the occupied structure. (0-20)

Sexual Assault 45-5-502(3)

A person commits this offense if a person knowingly subjects another person to any sexual contact without consent and: (2-100, L)

If the victim is less than 16 years old and the offender is 3 or more years older than the victim. (victim < 16: 2-100, L)

OR

The offender inflicts bodily injury upon anyone in the course of committing sexual assault. (2-100, L)

Incest 45-5-507

A person commits this offense if it is a Sexual Assault and one of the factors listed under Sexual Assault is present.

(See also Levels III, VII) (0-100, L; victim < 16: 4-100, L)

Escape 45-7-306(3)(b)

A person commits this offense if the person has been charged with or convicted of a felony and eludes official detention or fails to return to official detention following temporary leave granted for a specific purpose or is in a county work program and fails to appear for work. (The detained person does not use or threaten to use force, physical violence, or a weapon or a simulated weapon.) (See also Level IV) (0-10)

LEVEL VI:

Description of characteristics:

- Aggravated promotion of prostitution is an offense against the person, specifically against the family. The victim is not a dependent of the offender.
- Five additional offenses are against the person: two of which are sexual but with no victim contact.

- Eleven out of 18 are offenses against property. Most recently, the 1999 Legislature changed the value at which a felony occurs from \$500 to \$1,000.

Aiding or Soliciting Suicide 45-5-105

A person commits this offense if a person purposely aids or solicits another to commit a suicide that does not occur. (0-10)

Aggravated Promotion of Prostitution 45-5-603(1)(a)

A person commits this offense if the person compels another to engage in or promote prostitution.
(See also Level III) (0-20)

Intimidation 45-5-203

A person commits this offense if the person threatens another under circumstances that reasonably tend to produce fear that the threat will be carried out or to cause the other person to perform or omit the performance of any act. (0-10)

Sexual Abuse of Children 45-5-625(1)(e)

A person commits this offense if the person possesses any visual or print medium in which children are engaged in sexual conduct, actual or simulated. (See also Level III) (0-10)

Criminal Mischief 45-6-101

A person commits this offense if the person injures, damages, destroys, or tampers with property over \$1,000 in value of another without consent. (0-10)

Desecration of Capitol, Place of Worship, Cemetery, or Public Memorial 45-6-104

A person commits this offense if the person purposely defiles or defaces the Capitol, etc., places on or attaches a mark, design, or materials not properly a part of the Capitol, etc., or injures, damages,

or destroys any portion of the Capitol or of a place of worship, cemetery, or public memorial with over \$1,000 in damage. (0-10)

Theft 45-6-301 (all subsections)

A person commits this offense when the person obtains or exerts control over property of the owner and exerts unauthorized control over property exceeding \$1,000 in value or over any domesticated hoofed animal; obtains control by threat or deception; obtains control of property known to have been stolen; obtains control over public assistance or workers' compensation benefits; or commits insurance fraud. (0-10)

Failure to Return Rented or Leased Personal Property 45-6-309

A person commits this offense when the person fails to return rented or leased property over \$1,000 in value to the rightful owner within 48 hours after the time provided for the return in the rental/lease agreement. (0-10)

Unlawful Use of a Computer 45-6-311

A person commits this offense when the person obtains the use of or alters or destroys a computer or computer equipment over \$1,000 in value without consent of the owner. (0-10)

Unauthorized Acquisition or Transfer of Food Stamps 45-6-312

A person commits this offense when the person acquires, purchases, possesses, or uses more than \$1,000 in food stamps that the person is not entitled to; or transfers, sells, trades, or gives more than \$1,000 in food stamps to another person not entitled to use them; or as part of a common scheme. (0-10)

Medicaid Fraud 45-6-313

A person commits this offense when the person obtains Medicaid payment or benefit over \$1,000 in value under false pretenses. (0-10)

Issuing a Bad Check 45-6-316

A person commits this offense when the person issues a check over \$1,000, either real or fictitious, knowing that it will not be paid by the depository. (0-10)

Deceptive Practices 45-6-317

A person commits this offense by deceptively using a credit card or making a deceptive statement to obtain property, labor, or services that exceed \$1,000 in value. (0-10)

Forgery 45-6-325

A person commits this offense when the person, without authority, makes or alters any document capable of being used to defraud and if the value of the property labor or services exceeds \$1,000 in value. (0-20)

Illegal Branding or Altering or 45-6-327

Obscuring a Brand

A person commits this offense when the person brands any commonly domesticated hoofed animal or removes, covers, alters, or defaces a brand with the purpose to obtain unauthorized control over the animal. (0-10)

LEVEL VII:

Description of characteristics:

- Six offenses are against the public administration.
- Four offenses are against the public order, three of which involve destruction, and one is minding other people's business (privacy in communications).
- Four offenses are against the person: one is a sexual offense (incest), family related, and considered a crime by definition; another is also family related, but under the part for kidnapping (which is traditionally considered a violent offense)--custodial interference. They are related to the other two that are specifically offenses against the family: aggravated nonsupport and aggravated interference with a parent-child contact. Note that aggravated

interference with a parent-child contact involves taking a child out-of-state, and the sentence range is up to 18 months, while custodial interference has a sentence range of up to 10 years, with a limited exception for a first offense of taking a child out-of-state who is returned voluntarily.

Possession of Destructive Device 45-8-334

A person commits this offense when, with the purpose to commit a felony, a person possesses a destructive device in a public place or private habitation or on public transportation. (0-10)

Possession of Explosives 45-8-335

A person commits this offense when the person possesses, manufactures, transports, buys, or sells an explosive compound, flammable material, or timing/detonating device for use with an explosive compound or incendiary device. (0-20)

Possession of Silencer 45-8-336

A person commits this offense when the person possesses, manufactures, transports, buys, or sells a silencer to use it to commit an offense or knows that another person has such a purpose. (5-30)

Incest 45-5-507(1)

A person commits this offense if the person knowingly marries or cohabits with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter. (*See also Levels III - SIWC, V - Sex Assault*) (0-100, L; victim < 16: 4-100, L)

Aggravated Nonsupport 45-5-621(2)(a)(i) and (ii)

A person commits this offense when the person leaves the state without making reasonable provisions for the support of a spouse, child, or other dependent or has been previously convicted of nonsupport. (0-10)

Aggravated Interference With Parent-Child Contact 45-5-632

A person commits this offense when the person changes the residence of a minor child to another state without giving written notice to or without written consent of the person entitled to parent-child contact pursuant to a court order. (0-18 months)

Custodial Interference 45-5-304

A person commits this offense when, knowing that the person has no legal right to do so, takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution. (Note: exception for first alleged commission, leaving state, and voluntarily returning child.) (0-10)

Bribery in Official Political Matters 45-7-101

A person commits this offense when the person confers, agrees to confer upon another, or solicits, accepts, or agrees to accept benefit as a consideration for the recipient's decision, vote, recommendation, or other exercise of discretion as a public servant, party official, or voter or in the exercise of official discretion in a judicial or administrative proceeding. (0-10)

Threats and Other Improper Influence in Official and Political Matters 45-7-102

A person commits this offense when a person threatens harm or injures any person, public servant, party official, or juror, family member of that person, or property of that person with the purpose to influence the person's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant. (0-10)

Perjury 45-7-201

A person commits this offense when the person, in any official proceeding, makes a false statement under oath or swears or affirms the truth of a statement previously made when the statement is material. (0-10)

Tampering With Witnesses and Informants

45-7-206

A person commits this offense when the person, believing that an official proceeding or investigation is pending or about to be instituted, attempts to induce or cause a witness or informant to testify or inform falsely, withhold testimony or information, or to absent one's self from any proceeding or investigation to which one has been summoned. (0-10)

Tampering With or Fabricating Physical Evidence

45-7-207

A person commits this offense when the person, believing that an official proceeding or investigation is pending or about to be instituted, alters, destroys, conceals, or removes any record, document, or thing in order to impair its verity or availability in a proceeding or investigation or makes, presents, or uses any record, document, or thing that is false to mislead an investigator. (0-10)

Bail Jumping

45-7-308

A person commits this offense if the person, after being released on bond by the court, fails to appear at that time and place for the proceeding.

(0-10)

Privacy in Communications

45-8-213(1)(b)

A person commits this offense when a person uses a telephone to attempt to extort money or another thing of value from any person or to disturb by repeated phone calls the peace, quiet, or right of privacy of any person at the place where the telephone call or calls are received.

(0-5)

LEVEL VIII:

Description of characteristics:

- One offense is against public administration.
- One offense is against the public order and could be considered a weapons offense.

Carrying a Concealed Weapon

45-8-316(2)

A person commits this offense when the person who has previously been convicted of a felony carries or bears a concealed weapon. (0-5)

Impersonation of a Public Servant

45-7-209

A person commits this offense when the person falsely pretends to hold a position in the public service with the purpose to induce another individual to submit to the pretended official authority or otherwise act in reliance upon that pretense to the individual's prejudice. (0-5)

LEVEL IX:

Description of characteristics:

- The single offense is related to animals and considered an offense against the public order.

Causing Animals to Fight

45-8-210

A person commits this offense when the person owns, possesses, keeps, or trains any animal with an intent for the animal to fight or be engaged in an exhibition to fight; allows an animal to fight; permits a violation on premises, aids, or abets; or participates in an exhibition. (1-5)

APPENDIX

Felony Offenses Not Included by Sentencing Commission or Enacted Since 1995

Statute	Offense	Min Sent	Max Sent
45-5-205(3)	Negligent vehicular assault - serious bodily injury (Ch. 317, L. 1997) (See Level III)	0	5 y
45-5-221	Malicious intimidation regarding human rights (not included) (See Level VI)	0	5 y
45-5-223	Surreptitious visual observation or recordation in a public establishment - victim is minor (Ch. 303, L. 1997)	0	2 y
45-5-503(3)(d)	Sexual intercourse without consent - incarcerated victim (Ch. 84, L. 1999) (See Levels III, IV)	0	5 y
45-5-505	Deviate sexual conduct (not included)	0	10 y
45-5-625(1)(d)-(1)(g)	Sexual abuse of children (visual or print medium, financing activities) (Ch. 187, L. 1995) (See Levels III, VI)	0-4 y	100 y
45-5-634	Parenting interference (See Custodial Interference in Level VII) (Ch. 343, L. 1997)	0	10 y

Title 45 Felony Drug Offenses⁵¹

Statute	Offense	Min Sent	Max Sent
45-9-101	Criminal distribution of dangerous drugs	1-40 y	Life
45-9-102	Criminal possession of dangerous drugs	0-2 y	5 y
45-9-127	Carrying dangerous drugs on a train		
45-9-103	Criminal possession with intent to distribute	0-2 y	20 y
45-9-104, 105, 106	Fraudulently obtaining or altering the labels of dangerous drugs	1-5 y	5-10 y
45-9-107	Criminal possession of precursors to dangerous drugs	2 y	20 y
45-9-109	Criminal distribution of dangerous drugs on or near school property	3 y	Life
45-9-110	Criminal production or manufacture of dangerous drugs	5-40 y	Life
45-9-112	Criminal distribution of imitation dangerous drug	0	5-10 y
45-9-113	Criminal possession of imitation drug with purpose to distribute	0	5 y
45-9-114	Criminal advertisement of imitation dangerous drug	0	10 y
45-9-115	Criminal manufacture of imitation dangerous drug	0	10 y

⁵¹ Sentence ranges may be dependent on type or amount of drug, number of previous convictions, or age of victim. There are also sentence enhancements for continuing criminal enterprise (45-9-125) and possession and storage of dangerous drugs (45-9-130), and there are alternative sentencing authority and exemptions in Title 45, chapter 9, part 2, MCA.

Felony Offenses Outside of Title 45

Statute	Offense	Min Sent	Max Sent
2-16-114 ^{*52}	Use of facsimile signature of authorized officer on a public security or instrument of payment with intent to defraud	0	10 y
10-3-507	Violation of rules and orders under a proclamation of emergency	0	5 y
15-61-205	Medical care savings account false claims over \$300	0	10 y
16-6-302	Penalty for sale of alcoholic beverage without a license	1 y	5 y
16-11-134 16-11-146	Forgery of tobacco license stamp or insignia	1 y	14 y
19-18-207	Theft from disability and pension fund of a fire department relief association	1 y	10 y
20-9-435	Failure or refusal of school trustee to pay county treasury after sale of bond	1 y	10 y
22-3-808(1)(b)	Unauthorized possession, buy, sell, transport, barter, or display human skeletal remains or burial material for commercial use	0	20 y
23-5-155 23-5-162	Counterfeiting or defacing a (gambling-related DOJ) document	0	10 y
23-5-156 23-5-162	Fraud, illegal activity in gambling activity over \$750 in value or use of illegal gambling device or enterprise or as a common scheme	0	10 y
23-5-622 23-5-162	Tampering with video gambling machine	0	10 y
27-1-606	Violation of abolition of certain causes of action	1 y	5 y
30-7-701	UCC Penalty for issuing receipt when goods not delivered	0	5 y
30-7-703	UCC Penalty for issuing duplicate receipt when original is outstanding without marking it "duplicate"	0	5 y

⁵²Asterisks indicate that the felony penalty is in 46-18-213, MCA, when no penalty is specified.

Statute	Offense	Min Sent	Max Sent
30-10-306	Violation of securities regulations	0 (1 y on 2nd)	5 y
30-10-325	Operation of pyramid scheme	0	10 y
30-10-913	Violate Montana's Living Trust Act	0	10 y
30-13-142	Unauthorized manufacture of sound recordings	0	10 y
30-14-704	Fraudulent financing of mining and oil companies	90 days	3 y
30-14-1414	Telemarketing fraud over \$500	0	10 y
32-1-234	False official report as to condition of bank	0	5 y
32-1-236	False statements, entries, papers by bank personnel	1 y	10 y
32-1-441*	Violation of operation and regulation of banks and trust companies	0	10 y
32-1-463*	Sale of securities by officer to bank	0	10 y
32-1-464*	Fraud by bank director, officer, agent, or employee	0	10 y
32-1-473	Theft of funds by bank director, officer, employee	0	20 y
32-1-504	Receive/accepting trust deposits in insolvent bank as general assets	0	5 y
32-1-505	Receiving deposits when insolvent and false statements	0	5 y
32-2-107*	Obtaining property by fraud by building and loan association	0	10 y
32-2-307	False official report of condition of building and loan association	2 y	5 y
32-2-107*	Obtaining property by fraud building and loan association	0	10 y
32-8-518	Violation of confidentiality of foreign capital depository	0	10 y
32-8-522	Unlawful disclosure of financial record of foreign capital depository	0	10 y
33-2-104*	Representing or aiding unauthorized insurer	0	10 y
33-3-401	Unlawful removal of records or assets of domestic insurer	0	5 y

Statute	Offense	Min Sent	Max Sent
37-3-325	False application or medical license, practice of medicine under false name, or impersonation of another licensee	1 y	10 y
39-33-205	Employment of strikebreakers	1 y	2 y
39-71-2327	Improper use of State Fund funds	0 y	2 y
46-18-224	Additional sentence for use of armor-piercing ammo	5 y	25 y
46-23-507	Failure of sexual or violent offender to register	0	5 y
46-31-204	Escape from custody on detainer	1 y	10 y
49-2-602	Housing discrimination - bodily injury - death	0 0	10 y life
50-20-108 50-20-112	Death of viable premature infant born alive	0	5 y
50-20-109 50-20-112	Unlawful practice of abortion	0	5 y
50-20-401	Partial-birth abortion	5 y	10 y
50-32-405	Failure to report the distribution of a precursor to a controlled substance	0	10 y
50-63-102	Malicious setting or leaving fire causing damage with intent to destroy	1 y	50 y
50-79-303	Knowingly dispose of radioactive material, byproduct material, or special nuclear material	0	2 y
52-5-114	Aiding resident in leaving or not returning to a youth correctional facility	0	2 y
61-3-603	Alteration or forgery of certificate of motor vehicle ownership or assignment of certificate	0	10 y
61-3-604	Falsify motor vehicle identification number	0	10 y
61-3-607	Tampering with odometer, violate odometer statement	0	10 y
61-4-405	Monopolies in financing of motor vehicles	1 y	5 y

Statute	Offense	Min Sent	Max Sent
61-8-422	Transfer, sale, or encumbrance of vehicle subject to seizure or forfeiture	0	2 y
72-17-302	Sale or purchase of human body parts	0	5 y
75-10-418	Waste and litter control violations	0	3 y 6 y 2nd
77-1-112 77-1-115	Administration of state lands violation, exceeds \$1,000	1 y	10 y
77-3-409*	Misconduct of officers in relation to oil and gas leases	0	10 y
77-3-410*	False statements relating to oil and gas leases	0	10 y
80-4-428*	Operating warehouse or commodity dealer without a license, fraudulent receipt, false information	0	10 y
80-4-429*	Commodity dealer or warehouse operator violations	0	10 y
80-8-306	Major pesticide violations that results in significant harm	0	10 y
81-3-233	Removal of livestock from state without inspection	0	3 y
81-5-102	Driving animals upon railroad track with intent and injury or death results	0	5 y
81-7-113*	False certificate or affidavit in claim for bounty	0	10 y
81-8-216*	Knowingly fails to establish a custodial account for money for others	0	10 y
81-8-234 81-8-235	Bad checks for livestock purchase	0	5 y
81-9-234	Livestock slaughter and sales violations with intent to defraud or distribution of adulterated article	0	3 y
81-9-423	Mutilation or concealment of hides	1 y	10 y
81-30-105	Protection of farm animals and research facilities violations over \$500 in damage	0	10 y
82-2-115	Filing of false mining claims	0	5 y

Statute	Offense	Min Sent	Max Sent
85-1-622	No gain from renewable resource grant and loan program transaction on other than salary, fee, compensation.	0	2 y
87-2-114	Unlawful possession of hunting license or permit of another	0	5 y
87-3-118	Sale or possession of wildlife over \$1,000	0	5 y
90-2-1121	Prohibited compensation to public officers or employees for reclamation or development grants	0	2 y

**Misdemeanors That May Rise to Level of Felony Upon
Second or Subsequent Offense**

Statute	Offense	#	Min Sent	Max Sent
22-3-808(1)(a) 22-3-808(1)(c)	Violations of human remains and burial site protection	2nd	0	5 y
30-14-1414	Failure to comply with the Telemarketing Registration and Fraud Prevention Act	2nd	0	5 y
42-8-108	Violation licensure of child-placing agency	2nd	0	5 y
45-5-206(3)(a)	Partner and family member assault	3rd	30 days	5 y
45-5-220(3)	Stalking	2nd or TRO ⁵³	0	5 y
45-5-223	Surreptitious visual observation or recordation in a place or residence	3rd	0	5 y
45-8-213(1)(a)	Privacy in communications	3rd	0	5 y
45-5-504(1) and (2)(c)	Indecent exposure	3rd	5 y	100 y Life
45-8-340(4)	Possessing a sawed-off firearm	3rd	0	5 y
45-8-211	Cruelty to animals	2nd	0	2 y
45-6-319	Chain distributor schemes	2nd	0	5 y
45-9-102	Criminal possession of dangerous drugs	2nd	0	3 y
50-20-215	Coercion of minor to have abortion	2nd	10 days	5 y
52-3-825	Elder abuse, abuse of a developmentally disabled person	2nd	0	10 y
61-3-604	Altering motor vehicle identification number	2nd	1 y	5 y
61-8-731	Driving under influence of alcohol or drugs	4th	6 mos	13 mos
75-5-632	Water quality violations	2nd	0	2 y
80-15-414	Violate agricultural chemical ground water protection	2nd	0	2 y

⁵³ TRO means that a person is under a temporary restraining order.

81-9-118	Slaughter violation or falsifying records	2nd	1 y	5 y
----------	--	-----	-----	-----

PART B

STATE-TRIBAL RELATIONS

The Interim in Review

**Topics Considered,
Fulfilling the Committee's Statutory Obligation
to Provide a Forum for State-Tribal Relations**

The following is not intended to be a comprehensive retrospective on *all* of the LJAC's activities and discussions concerning state-tribal relations; rather it is meant to highlight some of the Committee's substantive work in this area and provide background on the issues on which the Committee took action.

Crow Tribe-Montana Water Rights Compact

Members of the LJAC had barely enough time to recover from the 1999 Legislative Session before they were called to duty in June of that year. The Montana Water Rights Compact Commission had reached a settlement on water rights and coal severance tax issues with the Crow Tribe. Because the settlement would have to be ratified by the Legislature, the Legislative Council assigned the LJAC to work with a subcommittee of the Environmental Quality Council (EQC) to hold public hearings on the negotiated settlement.

In mid-May 1999, the LJAC, the EQC Crow Compact Subcommittee, and members and staff of the Water Rights Compact Commission traveled to Crow Agency and to Billings to receive public comment on the negotiated settlement. The public hearings were held in anticipation of the Governor calling the Legislature into a special session to discuss Compact ratification.

The 56th Legislature met in special session in June 1999 and ratified the Compact settlement. However, legislative ratification is just one of several hurdles that the negotiated Compact must clear--it must be ratified by Congress and approved by the Crow Tribe, neither of which had occurred by October 2000.

Committee's Introduction to the Tribes

In July 1999, the LJAC's presiding officers sent a letter of introduction to the leaders of Montana's Indian tribes on behalf of the Committee (Appendix E). The letter explained the Committee's statutory responsibilities and described some of the state-tribal relations issues

that the Committee anticipated addressing during the interim. Tribal leaders were also invited to attend and participate in future meetings and bring any concerns that they may have to the Committee's attention.

To follow up the July letter, LJIAC staff attended an August 1999 meeting of the Montana-Wyoming Tribal Leaders' Council at Crow Agency. During a brief presentation, staff distributed information about the LJIAC and its membership, discussed the Committee's state-tribal relations agenda for the interim, and reiterated the invitation to attend meetings or bring items of concern to the Committee or to Committee staff.

Human Skeletal Remains and Burial Site Protection Act -- Repatriation

In 1991, the Montana Legislature, upon discovery that existing state law did not protect unmarked, unrecorded, and unregistered burial sites on state or private land from pilferage, disturbance, and destruction, enacted the Human Skeletal Remains and Burial Site Protection Act to afford equal protection and respect for all burial sites, human skeletal remains, and funerary objects. The 1991 Act did not, however, provide a mechanism to repatriate or return human skeletal remains or funerary objects that were taken from unprotected burial sites on state or private land prior to its effective date of July 1, 1991.

At the LJIAC's November 1999 meeting, Germaine White and Rob Hunter of the Confederated Salish and Kootenai Tribes discussed the history and implementation of the Act and asked the Committee to consider some suggestions for amending it. The issue was taken up by the LJIAC's Indian Affairs Subcommittee in August 2000. Eddy McClure, staff attorney, discussed two specific issues that members of the

state's Burial Preservation Board had asked her to examine. Ms. McClure's discussion centered around the following questions:⁵⁴

1. Is a new appropriation or other amendment to the Human Skeletal Remains and Burial Site Protection Act necessary to ensure that Board members are reimbursed for travel expenses to the Board's annual meeting?
2. Can legislation be proposed to retroactively apply the provisions of the Act to provide for the possible return of human skeletal remains and burial objects recovered from burial sites prior to the adoption of the 1991 Human Skeletal Remains and Burial Site Protection Act?

Ms. McClure explained to the Subcommittee that an amendment is not necessary to reimburse Board members for expenses because section 22-3-804(5), MCA, provides that members "serve without pay but are entitled to reimbursement for travel, meals, and lodging pursuant to 2-18-501 through 2-18-503". The Board is administratively attached to the Department of Commerce, and it is the Department's responsibility to reimburse members from the account established in section 22-3-811, MCA, for that purpose.

As a result of Ms. McClure's presentation to the Subcommittee, members requested that a bill (LC 101) be drafted to address Question #2 for the LJIAC to consider at its final meeting in August.

LC 101 represents an effort to provide a seamless and consistent state policy to ensure that all human skeletal remains and funerary objects interred with those remains as part of the death rite or ceremony are treated with dignity and respect. If enacted by the 2001 Legislature, LC

⁵⁴Eddye McClure. *Montana's Human Remains and Burial Site Protection Act: Repatriation and Board Reimbursement* (Montana Legislative Services Division, August 2000). A copy can be obtained from the Legislative Services Division or from the LJIAC's website.

101 would work in conjunction with existing federal legislation and would require all state agencies and museums receiving state funding to prepare and distribute an inventory listing any human skeletal remains or funerary objects within their possession or control. The bill provides an opportunity for a lineal descendant, tribe, or other cultural group claiming cultural affiliation with human skeletal remains or funerary objects listed on the inventory or any remains or objects not listed on the inventory but known to be in the possession or control of a state agency, museum, or private individual within state jurisdiction to file a written claim requesting a repatriation hearing.

Following a hearing conducted by a hearings examiner appointed by the Burial Protection Board under the provisions of the Montana Administrative Procedure Act, the Board may authorize the repatriation of remains or funerary objects to a claimant who establishes by a preponderance of the evidence cultural affiliation with the remains or objects. The bill authorizes the Board to protect sacred or sensitive information to the full extent allowed under the privacy guarantee of the Montana Constitution, provides for an appeal to District Court of a Board decision regarding repatriation, and provides for payment of all court costs by the losing party.

The LJIAC recommends that repatriation legislation be brought before the 2001 Legislature and formally requests LC 101 as a

State-Tribal Economic Development Commission

The 1999 Legislature enacted House Bill No. 670 (HB 670) (Ch. 512, L. 1999), establishing a State-Tribal Economic Development Commission to be administered by the Governor's Office. The bill provides that the

Commission, composed of nine members appointed by the Governor, is responsible for:

- < assisting, promoting, encouraging, developing, and advancing economic prosperity and employment on Indian reservations in Montana by fostering the expansion of business, manufacturing, tourism, agriculture, and community development programs;
- < cooperating and acting in conjunction with other organizations, public and private, to benefit tribal communities;
- < recruiting business enterprises to locate on or invest in enterprises on the reservations; and
- < identifying, obtaining, and coordinating federal, state, and private sector gifts, grants, loans, and donations to further economic development on the Indian reservations in Montana.

HB 670, in part, requires the Commission to:

- < determine, with assistance from the tribal business center coordinator and the federal grants coordinator in the office of the Indian affairs coordinator, the availability of federal, state, and private sector gifts, grants, loans, and donations to tribal governments, Indian business enterprises, and communities located on Indian reservations in Montana;
- < apply for grants listed in the Catalog of Federal Domestic Assistance for which the Commission is eligible and that would, if awarded, supply identifiable economic benefits to any or all of the Indian reservations in Montana;
- < in cooperation with a tribal government, and when allowed by federal law and regulation, assist the tribe in applying for grants listed in the

Catalog of Federal Domestic Assistance for which an appropriate tribal entity is eligible and that would, if awarded, supply identifiable economic benefits to any or all of the Indian reservations in Montana;

- < evaluate the apportionment of current spending of federal funds by state agencies in areas, including but not limited to economic development, housing, community infrastructure, business finance, tourism promotion, transportation, and agriculture;
- < conduct or commission and oversee a comprehensive assessment of the economic development needs and priorities of each Indian reservation in the state;
- < notify tribal governments, the Governor, the Indian affairs coordinator, and the Directors of the Departments of Commerce, Agriculture, and Transportation of the availability of specific federal, state, or private sector funding programs or opportunities that would directly benefit Indian communities in Montana;
- < assist tribal governments and other tribal entities that are eligible for federal assistance programs, as provided in the most recent published edition of the Catalog of Federal Domestic Assistance, in applying for funds that would contribute to the respective tribes' economic development; and
- < hire a tribal business center coordinator and a federal grants coordinator and subsequently provide administrative support for both positions.

HB 670 authorized the transfer of \$200,000 from the general fund into a state special revenue account to be used for administrative costs, to pay the salaries of the staff, and to cover the cost of conducting or updating economic needs assessments for each of the reservations.

The LJIAC received periodic updates from the Office of the Coordinator of Indian Affairs on the progress of appointing the Commission and hiring staff. When HB 670 was enacted, the Legislature anticipated that the Commission could complete its work in 2 years. The LJIAC was concerned that because of unexpected delays in classifying the staff positions and in initiating the hiring process, the Commission would not have enough time to set its assigned projects into motion before the Act would terminate on June 30, 2001. At its final meeting in August 2000, the LJIAC voted to give the process 4 more years to work and requested a bill to change the termination date to June 30, 2005.

The LJIAC recommends that the 2001 Legislature consider a bill (LC 116) extending the termination date of the State-Tribal Economic Development Commission to June 30, 2005.

The Blackfeet Reservation

In 1994, the legislative Committee on Indian Affairs (CIA) began a tradition of traveling to Montana's Indian reservations to meet onsite with tribal officials and tribal members. The CIA traveled to Fort Belknap Reservation in 1994, Crow and Fort Peck Reservations in 1995 and 1996, and Northern Cheyenne Reservation in 1997. The LJIAC recognized the value of those visits and agreed to make Blackfeet Reservation the next destination.

Then Blackfeet Tribal Business Council Secretary and former state Representative George Heavy Runner and several of the tribe's staff accompanied the Committee members on a bus tour that began by heading west of town along Kiowa Camp Road, back toward Browning via the Star School Road, and through numerous housing projects located on the outskirts of Browning. Along the way, Secretary Heavy Runner discussed a number of topics with Committee members. He said that the Kiowa Camp Road corridor is the subject of the preliminary

stages of an Environmental Impact Study (EIS) being conducted by the Montana Department of Transportation (DOT). The DOT is planning to widen the road, which is used by tourists to access the mountains and, less often, by locals to reach outlying housing developments and communities. Although widening the road may make it safer for travel, tribal members are concerned about the effects that project will have on wetlands and other sensitive environmental features. Secretary Heavy Runner stressed that being kept in the loop and consulted as the EIS progresses are of utmost importance to the tribe.

While the bus skirted the mountains that make up the eastern edge of Glacier Park, Secretary Heavy Runner remarked that grizzly bears have been wandering onto the Blackfeet Reservation in increasing numbers. He noted that the tribe would be interested in developing its own grizzly bear management plan in the interest of protecting tribal members who live in outlying areas and are vulnerable to grizzly encounters.

Back inside the Browning city limits, the bus stopped at the juvenile detention center, where Committee members received a tour of the facility and learned of its holding capacity, the offenses that most juveniles are charged with (breaking curfew and minor-in-possession), and the director's plans for improving the physical structure. The end of the bus tour found the Committee at Blackfeet Community College, where an impressive construction project was nearing completion. Members toured the building that will house numerous classrooms, a student center, a bookstore, and a special circular ceremonial room with a firepit in the center.

The LJIAC met with the Blackfeet Tribal Business Council, where the focus was on opportunities to improve communication and understanding between the State of Montana and the Blackfeet Nation. Secretary Heavy Runner pointed out several times during the day that complications often arise because of the overlapping jurisdictional layers--city, county, state, tribal, and federal--that exist in Browning and on

reservation land. This jurisdictional morass is not unique to Browning, and it forms the basis for many of the dilemmas facing tribal governments.

The Business Council commented during the meeting that its members hoped the Legislature would separate the Indian affairs component from the LJAC's duties and create a stand-alone state-tribal relations interim committee.

During the afternoon session, Committee members heard a presentation on tribal welfare issues from Patty LaPlant of the Glacier County Public Assistance Office. The Committee learned that: much of the local employment opportunities are seasonal, with May through September seeing the highest rates of employment; welfare cases in Glacier County comprise 15% of all cases in Montana; and in the near future, public assistance caseloads on Blackfeet and Fort Peck Reservations will comprise one-third of all cases in Montana.

To a member, the LJAC found its experience on the Blackfeet Reservation to be invaluable in deepening the Committee's understanding of the challenges and opportunities facing the Blackfeet Nation and the State of Montana.

The LJAC had planned to visit the Flathead Reservation in the summer of 2000, but the convening of the June 2000 Special Session resulted in the cancellation of the Committee's scheduled June meeting.

STUDY ASSIGNED TO THE COMMITTEE

HOUSE JOINT RESOLUTION NO. 12

House Joint Resolution No. 12
Study of a Commission on Indian Affairs
Prepared by
Connie Erickson

INTRODUCTION

American Indians constitute one of the most rapidly growing segments of the population of the United States. Between April 1, 1990, and July 1, 1999, the American Indian and Alaska Native population grew 16%, compared to 9.7% for the nation's population as a whole.⁵⁵ According to census projections, the American Indian, Eskimo, and Aleut population will grow to 3.1 million by 2020.⁵⁶ This rate of growth is far faster than either Whites or African-Americans but less than Hispanics or Asians and Pacific Islanders. During that same time period of 1990 to 1999, Montana experienced a 19% growth in the population of American Indians within the state.⁵⁷ Indians now constitute 6.5% of the total Montana population, giving Montana a ranking of fifth in the nation in the percentage of American Indians and Alaska Natives.⁵⁸

Federal laws, such as the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Gaming Regulatory Act of 1988, have resulted in greater interaction between tribal governments and the governments of the states in which reservations are located. Unfortunately, much of the interaction has resulted in litigation as each side holds steady to its position and its right of sovereignty. As a result, states are seeking a more conciliatory method for dealing with

⁵⁵U.S. Bureau of the Census, "Census Bureau Facts for Features" (Washington, D.C., October 21, 1999).

⁵⁶Ibid.

⁵⁷U.S. Bureau of the Census, "States Ranked by American Indian and Alaska Native Population, July 1, 1999" (Washington, D.C., August 31, 2000).

⁵⁸Ibid.

tribal governments. Currently, 36 states have either an office of Indian affairs, a state-tribal commission, or an individual who acts as a liaison between the state and tribal officials and advances the concerns of American Indians. In Montana, that role is currently fulfilled by the Coordinator of Indian Affairs. The role of the Coordinator is to assess the problems of all Indians in the state, both on and off the reservations, and to assist them in communicating their needs to the appropriate state agencies. The Coordinator also acts as a representative and spokesperson for tribes and other organized groups of Indian people. The Coordinator must become acquainted with the problems confronting Montana Indians, advise the Legislative and Executive Branches of state government of those problems, make recommendations for the alleviation of those problems, and serve the Montana Congressional Delegation as an adviser and intermediary in the field of Indian affairs.

The Coordinator of Indian Affairs is appointed by the Governor from a list of five qualified Indian applicants. The list must be agreed upon by the tribal councils of the respective Indian tribes of the state. The Coordinator's office is attached to the Governor's Office, and the Coordinator serves at the pleasure of the Governor.

The Office of Coordinator of Indian Affairs was created by the Montana Legislature in 1951 in recognition of the severe economic and social problems that Indians faced and the need for the state to address those problems in cooperation with the federal government. The first office was staffed by a Coordinator and a stenographer. In the beginning, the Coordinator dealt only with Indians who resided on one of Montana's seven reservations. In 1969 and again in 1974, the Legislature expanded the Coordinator's duties to encompass the needs of off-reservation Indians and the landless Indians who had neither a reservation nor were federally recognized. In the 50 years since the creation of the Coordinator's office, the complexities of the state-tribal relationship have multiplied, resulting in increased demands upon the Coordinator's office. Yet, in 50 years time, the number of employees in the office has not

increased. Today, a Coordinator and an administrative officer still handle all of the duties and responsibilities of the office.

In 1998, Wyman McDonald, Coordinator of Indian Affairs from 1996 to 1999, proposed the establishment of a Commission on Indian Affairs that would replace the existing Coordinator's office and incorporate all of the duties and responsibilities of that office along with the relevant duties and responsibilities of the LJAC. He envisioned a Commission as the primary liaison between the state and the tribes in order to improve intergovernmental relationships and communications. The Commission on Indian Affairs would centralize and integrate the operations of both the executive and legislative entities responsible for implementing the government-to-government relationship between the state and the tribal nations of Montana. McDonald was unable to develop his proposal and garner the necessary tribal support for the proposal in time for the 1999 Legislative Session. As an alternative to introducing legislation creating a Commission, Representative Carol Juneau introduced House Joint Resolution No. 12 (HJR 12), calling for a study of the proposal to create a state Commission on Indian Affairs as a way of improving the relationship between the state and the Indian tribes of Montana. The mission of a Commission would be to serve as the primary forum for addressing tribal-state concerns and issues. It would give both the state and the Indian tribes an opportunity to:

1. develop a formal relationship to improve communications and create strategies to strengthen the unique relationship that exists between these two government systems in Montana;
2. enter into a dialogue on issues of common concern in order to reach a better understanding and relationship; and

3. bring together state agencies and tribal agencies to work on common issues of mutual concern to better serve all Montanans.

The resolution was passed by the Legislature, and the study was assigned to the LJAC. In September 1999, the LJAC adopted a study plan for HJR 12. The study plan called for a dialogue with tribal leaders to determine the efficacy of a state Commission on Indian Affairs; a review of the functions and operations of the current Office of Coordinator of Indian Affairs; a review of similar commissions in other states; and an assessment of the needs of state agencies, state officials, and legislators in working with Indian tribes. It was determined early on by the Committee that the success or failure of any Commission proposal would depend upon the level of support offered by each tribal government in Montana.

WHAT MAKES FOR A SUCCESSFUL INDIAN AFFAIRS COMMISSION?

In the early 1980s, the Arizona Indian Commission was investigated by the State Auditor General. The investigative report concluded that the Commission suffered from inefficiency and was not as involved in current Indian issues as it should have been and recommended that the Commission be replaced by a single Indian affairs representative in the Governor's Office. Some of the problems cited included a lack of support from the Governor's Office, poor initiative on the part of the commissioners and staff, and a lack of financial resources. Intense lobbying by the Commission and the Indian community resulted in the Commission being retained as an independent entity. However, the investigation prompted the Joint Legislative Budget Committee (JLBC) of the Arizona Legislature to conduct a study of similar Indian commissions in other states to try and identify the components of a successful commission. The investigation resulted in a report entitled *A Study on State Indian Commissions* authored by Sue Campbell Clark, JLBC student intern, for Mark C. Flanders, JLBC Fiscal Analyst.

As a result of her research, Ms. Campbell identified four components of a successful Indian affairs commission:

1. the support and trust of the Indian community;
2. consistent political and financial support from the state government;
3. representation from a cross-section of the Indian population; and

4. the initiative and political sense of the staff and the commissioners.⁵⁹

Support and Trust of the Indian Community

Although this component was consistently mentioned in the interviews conducted by Ms. Campbell, how to build that support and trust varies according to each state's Indian population and history of state/tribal relations. However, certain maxims apply across all states.

An Indian affairs commission should enhance, not interfere with, state/tribal communication. A commission must respect tribal sovereignty. A commission should never interfere with an individual tribe's ability to speak directly to the state.

An Indian affairs commission must coordinate Indian interests with state interests. An Indian affairs commission is a unique animal in that it is part of state government, yet it represents the interests of tribal governments. A balance needs to be struck in order for a commission to succeed. One side should never view a commission as a tool of the other side.

An Indian affairs commission should have some organizational autonomy. In order to effectively represent Indian interests, a commission needs to have some independence from state government. This will help protect a commission from changes in a state's political climate. For the same reasons, a commission should not be too closely tied to tribal governments.

Political and Financial Support From State Government

⁵⁹Sue Campbell Clark, *A Study on State Indian Commissions* (Arizona Joint Legislative Budget Committee, 1988), p. 6.

As with any other state commission or agency, adequate financial support is a must. This allows a commission to support the staff necessary to accomplish the mission of the commission and to identify the commission as an entity that "gets the job done".

In addition to financial support, a commission needs the support of influential political figures within state government. This support can be sought through formal channels or informal ties. The location of a commission is very important. Most commissions are located in a Governor's office. This adds credibility to a commission's work and provides access to an extremely influential person. However, some sort of access to the Legislative Branch is also desirable. This may be accomplished through informal ties to individual influential legislators and legislative staff.

Representation From a Cross Section of the Indian Population

Adequate Indian representation on the commission is essential. In those states with a wide diversity of tribes, representation can be problematic. In Montana, Indian representation could be easily achieved because of the small number of tribes. However, it is important that nonfederally recognized tribes also have some representation on the commission. The same is true for Indians who reside off of the reservations, generally in urban areas. In Montana, this population accounts for about 37% of the total Indian population in the state.⁶⁰

In determining Indian representation, there is some diversity of opinion as to whether or not the Indian representatives should be just tribal members or tribal officials. Because a commission is thought of as the embodiment of the government-to-government relationship, it is important that the representatives, both Indian and non-Indian, have the authority to speak for their respective governments.

⁶⁰1994 *Profile of the Montana Native American* (Coordinator of Indian Affairs, 1994), p. H-19-3.

Initiative and Political Sense

The final component of a successful Indian affairs commission is the initiative and political sense of the staff and the commissioners, especially the staff. Because a commission meets only periodically, it is important that the staff, especially the commission's executive officer, takes the initiative to ensure that the day-to-day operations of the commission proceed smoothly and that the decisions of the commission are implemented. The executive officer must also have the political sense to know who to work with to get things done, how to select issues for the commission to research, and what solutions to pursue.

The visibility and effectiveness of a commission depend in large part on the effectiveness of the staff. An executive officer with a poor sense of political issues or a lack of initiative could damage a commission's credibility with both the state and the tribes.

HOW DO INDIAN AFFAIRS COMMISSIONS IN OTHER STATES OPERATE?

Of the 36 states that have a specific entity charged with serving as a liaison between state and tribal governments, about 25 have created a council or commission for that purpose. The LJAC selected 10 states for review, looking specifically at commission makeup, appointing authorities, and duties and responsibilities. The commissions or councils selected were:

- < Arizona Commission on Indian Affairs
- < Colorado Commission of Indian Affairs
- < Idaho Council on Indian Affairs
- < Michigan Indian Affairs Council
- < Minnesota Indian Affairs Council
- < Nevada Indian Commission
- < North Dakota Indian Affairs Commission
- < Oklahoma Indian Affairs Commission
- < Oregon Commission on Indian Services
- < Wyoming Indian Affairs Council

Although the purposes of these commissions vary from state to state, they all share some basic responsibilities:

1. to review, monitor, and recommend policies and legislation on issues affecting American Indians;
2. to work with federal, state, local, and tribal governments and private entities to coordinate activities and develop programs to provide services to American Indians;
3. to gather and study information relating to the social, educational, and economic needs of American Indians and the adequacy of addressing those needs;

4. to work for greater understanding and improved relationships between Indians and non-Indians and between state and tribal governments; and
5. to promote increased participation by Indians in local and state affairs.

In addition to these basic responsibilities, some of the commissions have specific duties. The Colorado Commission of Indian Affairs is directed to study the status of recognition of all Indian groups, tribes, and communities presently existing in the state. The Minnesota Indian Affairs Council is responsible for developing programs to combat discrimination against Indians. The Oregon Commission on Indian Services must develop programs to inform Indians of the services that are available to them. The Wyoming Indian Affairs Council has only one duty: to focus attention on programs for cooperating with the Indian tribes in matters of common interest, including but not limited to:

- < taxation;
- < water rights;
- < wildlife concerns;
- < educational matters;
- < economic development; and
- < delivery of health and social services.

The number of commission members varies from a low of 5 commissioners in Nevada to a high of 29 commissioners in Minnesota. All but Wyoming specifically designate who can be members. The members are generally a mix of Indian and non-Indian. In six states, the Indian commissioners must be enrolled tribal members. Of the 11 Indian commissioners in Oregon, 2 must be nonreservation Indians. Four states have ex officio members who are elected state officials or directors of state departments. Oregon and Idaho each include legislators on their commissions. The term of office is statutorily specified in five states

and varies from 2 to 4 years. With the exception of Colorado and North Dakota, each commission elects its own officers. In Colorado, the Lieutenant Governor is the commission chair, while in North Dakota, the Governor chairs the commission. All of the commissions provide some sort of compensation (salary and/or expenses) to members. Idaho compensates state appointees only. Arizona compensates appointed members but not ex officio members.

Five of the commissions meet quarterly, one meets twice a year, one meets every other month, and two meet at the call of the chair or a specified number of members. Oregon's statutes do not specify meeting times.

Nine of the states authorize the employment of an executive director or executive secretary for the commission. The director is appointed by the commission in six states, by the Governor in one state, and by the Governor with the advice of the commission in two states. Oklahoma requires that the director be at least one-quarter Indian. In Colorado, the executive secretary must be an enrolled tribal member and is an ex officio member of the commission. Eight of the states also authorize the employment of other staff, generally on an "as needed" basis. In Idaho, the state and tribal governments share the burden of staffing the commission.

Each state reviewed has designed a unique Indian affairs commission that best fits its own needs; there is no "one-size-fits-all". The LJAC concluded from its review of these 10 state commissions that Montana also needs to design a commission that best addresses the needs of Montana's citizens, Indian and non-Indian alike, and Montana's state and tribal governments.

DO TRIBAL GOVERNMENTS BELIEVE THAT THE MONTANA LEGISLATURE SHOULD CREATE A COMMISSION ON INDIAN AFFAIRS?

The LJAC began its study of a state Commission on Indian Affairs by engaging members of the Montana-Wyoming Tribal Leaders' Council in a dialogue on the efficacy of a Commission at a meeting in Billings on September 17, 1999. At that time, the tribal leaders offered cautious support for a Commission. Gordon Belcourt, Executive Director of the Tribal Leaders' Council, told the LJAC that the Commission proposal must be carefully and precisely crafted. He felt that the Commission's tribal members should be elected tribal officials and that the Commission's legal authority should be carefully spelled out in statute. Mr. Belcourt asked what would be the relationship between the Commission and the various Native American advisory councils, committees, etc., that currently exist in state government. He believed that there would need to be clear lines of authority between the Commission and these other councils.

Other members of the Tribal Leaders' Council stressed the need for the government-to-government relationship between the state and each tribe to continue and not be diminished by the creation of a Commission on Indian Affairs. The representative of the Little Shell Band of Chippewa stated that he would like to see tribal members on the Commission who are not elected tribal officials. He believed that there are some tribal members who are very well-educated and would make better Commission members than elected officials. He felt that it should be left up to each tribe to decide who will be the tribal representative on the Commission. Representative Jay Stovall, LJAC member, felt that the general public should be represented on the Commission as well as state and tribal leaders. On many reservations, one-half or more of the population is non-Indian, and their interests need to be represented.

The tribal officials also expressed concern about what would happen to the position of the Coordinator of Indian Affairs. They felt that the

position should not be eliminated because the Commission would need someone to handle the day-to-day activities of the Commission. Senator Lorents Grosfield, presiding officer of the LJAC, told the tribal officials that it was his intent that the Coordinator would serve as staff to the Commission. However, instead of being appointed by the Governor, the Coordinator would be hired by the Commission or possibly hired by only the tribal members of the Commission.

The meeting ended with a commitment from both the LJAC and the Tribal Leaders' Council to continue working together on this proposal. It was also recognized by both the LJAC and the Tribal Leaders' Council that tribal support for the Commission proposal was essential to its success.

In February 2000, Representative Carol Juneau, vice presiding officer of the LJAC and author of HJR 12, spoke to the members of the Tribal Leaders' Council at a meeting in Billings and invited them to discuss the creation of a Commission on Indian Affairs by responding to a series of questions. The purpose was to elicit tribal input on the proposal from the very beginning rather than create a Commission and then ask the tribal leaders to respond. However, the tribal officials in attendance chose not to discuss the questions at the meeting. Rather, they requested that the questions be mailed to each tribal council for an individual tribal response. The LJAC complied with the request, and in mid-February each tribal council received a request to respond to the following questions:

1. *Do you think that the Montana Legislature should replace the Coordinator of Indian Affairs and the Committee on Indian Affairs with an Indian affairs commission?*
2. *If you do not think that the Legislature should replace the Office and the Committee with a commission, would you*

recommend any changes to the Office and the Committee that would improve their services to tribes?

3. *Who should serve as members of an Indian affairs commission and how should they be appointed?*
4. *Should the Indian affairs commission serve as an advisory body to the Governor or should the commission be an independent body capable of setting policy, adopting rules, sponsoring legislation, etc.?*
5. *Should the tribes participate in the funding of the Indian affairs commission?*
6. *Who should staff the commission?*

Of the eight tribal governments in Montana, only the Blackfeet Nation responded. The Blackfeet responses indicated a qualified support for the Commission proposal. Blackfeet support rested on assurances that the Montana Legislature would guarantee funding for the Commission for at least 5 years. The Blackfeet wanted a Commission that was independent of the Governor and capable of making its own recommendations, free of political bias, to the Legislature and to Executive Branch agencies. The tribe wanted the Commission to provide Montana with a respected voice that speaks on Indian issues and brings solutions to both state and tribal governments. If a Commission was not established, the Blackfeet asked that the Coordinator of Indian Affairs office be strengthened and removed from under the auspices of the Governor. To do an effective job as "the" liaison between the tribes and the state, the Coordinator needs additional resources and greater independence.

When the other tribes failed to respond to the questions, the LJAC directed staff to work with the Tribal Leaders' Council to seek tribal input into the study. Because the attempt to elicit tribal responses

through the mail failed, a request was made for time on the agenda of the next Tribal Leaders' Council meeting. The meeting was scheduled for June 21, 2000, and Representative Juneau again spoke with the tribal officials gathered for the meeting. At that time, the Chairman of the Chippewa Cree Tribe told Representative Juneau that the tribe did not support the Commission idea because of the perceived negative impact that such a Commission would have on the government-to-government relationship between the state and the tribes. A tribal council member from the Fort Peck Tribes stated that the Fort Peck Tribal Council had passed a resolution opposing the establishment of a Commission on Indian Affairs. The Blackfeet Nation and the Crow Tribe had both held tribal elections just prior to the meeting, resulting in a complete changeover in tribal leadership in both tribes. It remained to be seen whether the new Blackfeet Tribal Council would support the Commission proposal in the same manner as the previous tribal council. The Fort Belknap Community Council supported the Commission idea but offered its own version of a Commission, very similar to the proposal of former Coordinator Wyman McDonald. The remaining tribes offered no comments on the Commission proposal, although at a later meeting of the Indian Affairs Subcommittee of the LJIAC, a tribal council member from the Confederated Salish and Kootenai Tribes, speaking on his own behalf, offered the same concerns as the Chairman of the Chippewa Cree Tribe, namely the uncertainty of the impact of a Commission on the government-to-government relationship.

The lack of a response from the Northern Cheyenne Tribe, the Crow Tribe, the Little Shell Band, and the Confederated Salish and Kootenai Tribes may be attributed to any number of reasons: outright opposition, lack of interest, other concerns with a higher priority, change in leadership, lack of specifics, etc. Whatever the reasons, tribal support for a Commission on Indian Affairs does not currently exist, and without full tribal support and participation, an Indian affairs commission will never be successful.

DO STATE AGENCIES BELIEVE THAT THE LEGISLATURE SHOULD
CREATE A COMMISSION ON INDIAN AFFAIRS?

Although tribal support is vitally important to the success of a Commission on Indian Affairs, state government support is also important because it is in the state agencies where much of the interaction between the state and the tribes takes place. In order to gauge the level of state agency support, the LJIAC staff, with the assistance of agency directors, identified within each state agency an employee or employees responsible for liaison work with Indian tribes. In February 2000, a survey (Appendix F) was sent to 17 state agencies, asking for their input on the proposal to create a Commission on Indian Affairs that would centralize and integrate the operations of the current Coordinator of Indian Affairs and the Indian affairs responsibilities of the LJIAC. Of the 17 agencies surveyed, 13 responded.

State agency support for a Commission on Indian Affairs can be characterized as lukewarm at best. Although support certainly exists, very few respondents expressed great enthusiasm for the idea. On the other hand, those who supported the current configuration of a Coordinator of Indian Affairs and a Committee on Indian Affairs (in some form) were more adamant in their support. Also, a great many respondents either expressed no opinion one way or the other or were unsure of their support. There was support for the continuation of an Indian affairs committee, including support for a separate committee as existed prior to the enactment of SB 11.

If a Commission on Indian Affairs were to be created, state agencies want it to be advisory only, but with the ability to propose legislation. As far as powers and duties are concerned, the respondents recommended a wide variety of powers and duties. Interestingly enough, many of the recommended powers and duties could be performed by the current Coordinator of Indian Affairs with some additional staff and financial resources. State agencies believe that an Indian affairs

commission should be composed of tribal representatives, state and local government representatives, and private citizens.

CONCLUSION AND RECOMMENDATION

On August 4, 2000, the Indian Affairs Subcommittee of the LJAC met to make final recommendations to the full Committee regarding the Indian issues under consideration by the LJAC over the interim. With regard to the proposal to create a Commission on Indian Affairs, staff reiterated the importance of tribal support in order for a Commission to be successful. Because two tribes opposed the idea and four tribes never offered a response, staff questioned whether it was worth the effort to continue to pursue the idea of an Indian affairs commission. When asked by Subcommittee members what the major objection to an Indian affairs commission was, staff responded that tribal officials had expressed concern that a Commission would diminish the government-to-government relationship that the tribes currently enjoy with the state. Some tribal officials felt that a more appropriate approach was to elevate the position of Coordinator of Indian Affairs to cabinet level status and to give the office more financial and personnel resources to carry out its responsibilities for implementing the government-to-government relationship. Following the discussion, the Subcommittee unanimously recommended that it advise the LJAC that there is a lack of general support for the creation of a Commission on Indian Affairs and that the proposal be tabled at this time. The LJAC accepted the Subcommittee's recommendation at its final meeting of the interim on August 24, 2000.

The LJAC recommends that the proposal for a Commission on Indian Affairs not be pursued further at this time.

PART C

SUMMARY OF RECOMMENDATIONS

LJIAC 1999-2000 Interim Recommendations and Bills Requested by the Committee

Bills by Request of the Law, Justice, and Indian Affairs Committee

Before the change in interim committee structure brought about by SB 11, the Code Commissioner would bring several bills before the Senate Judiciary Committee during the session that codify Supreme Court opinions and that bring the statutes into conformance with Attorney General opinions. To introduce the bills to legislators, determine bill sponsorship, and ensure that the bills will be preintroduced, the suggested legislation will now be brought before the LJIAC toward the end of each interim. Bills in the list below that are marked with an asterisk () are suggested legislation that was brought before the Committee by the Code Commissioner and requested by the LJIAC.*

- < LC 101 Provide for Repatriation of Human Remains
- < LC 102 Create an Intermediate Appellate Court
- < LC 104* Provide That a Physician-Assistant Certified May Perform a Previability Abortion
- < LC 105* Eliminate Redundant Law Concerning Landlord Liability
- < LC 106* Clarify Discharge From Employment During Probationary Period
- < LC 107* Exclude Election Judges From Unemployment Insurance
- < LC 108* Establish Viability as an Element of the Offense of Partial-Birth Abortion
- < LC 109* Codify Family Law Exception to Contempt Appeals

- < LC 110* Clarify Information Disclosure of Peer Review Committee
- < LC 111* Clarify Place to Receive Custody of Youth
- < LC 112* Clarify Weapon Enhancement Statute
- < LC 115 Revise Child Abuse and Neglect Laws
- < LC 116 Extend Duration of Indian Economic Development Commission to 2005
- < LC 117 Authorize Criminal Statutes Revision Committee

Committee Recommendations

*The Committee made several recommendations for the 2001-02 LJAC to consider. Those statements are in **bold** typeface.*

HJR 37 Study of Women's Prison Issues

The LJAC recommends that during the 2001-02 interim, the Committee explore potential parity issues, programming issues, and costs and benefits of regional placement of female inmates versus placement in a single central facility.

The LJAC recommends that the DOC:

1. examine the effectiveness of its current chemical dependency programs;
2. consider including parenting programming in future budget requests;
3. examine the effectiveness of its current education, training, and vocational educational programs; and
4. explore developing more hands-on, practical training within the institution to better prepare inmates for employment upon their release.

The LJAC supports the DOC's efforts in teaching women inmates coping skills and life skills, including anger management, that will facilitate their successful return to society, as well as enhance their future employability.

The LJAC recommends that during the 2001-02 interim, the Committee review the results of the work of other committees that are exploring mental illness among correctional populations. The LJAC also recommends that the Committee examine any disparities between male and female correctional populations with regard to incidence of mental illness and the degree to which psychotropic medications are prescribed.

The LJAC recommends that any reasonable resources be made available to the inmates to accommodate their spiritual needs, including the performance of rituals and ceremonies that are integral to the practice of inmates' religions.

The LJAC also recommends that the DOC include in a future budget request a part-time chaplain for MWP.

The LJAC recommends that solid data be collected to evaluate the effectiveness of programs and to track program outcomes.

The LJAC recommends that during the 2001-02 interim, the Committee review any data that has been collected regarding program effectiveness.

The LJAC trusts that in future interims, the Committee will continue to follow up on women's prison issues as appropriate, ensuring that the needs and characteristics of those inmates are considered when the Legislature makes policy decisions affecting correctional populations.

SJR 14 Study of Sentencing Issues and Data

The LJAC adopts the Judiciary Committee Analysis Tool and Reference Guide (see Work Products at the end of Part A) and recommends that the tool be used:

1. during the 2001 Legislative Session to assist the House and Senate Judiciary Committees in the analysis of proposals for defining new crimes or proposals to amend current sentencing statutes;
2. by the LJAC and any other appropriate entities to further analyze the criminal sentencing statutes;
3. as a basis for further refinement by the LJAC based on changes made in the 2001 Legislature and other references that are not included in the tool but that are included in the Appendix of the Guide.

The LJAC recommends that the Code Commissioner include a cross reference in Title 45, MCA, regarding criminal sentences that are not in Title 45, MCA.

The LJAC recommends that a bill (LC 117) be presented to the 2001 Legislature that establishes a study committee, staffed by the DOJ, to revise the criminal statutes, with a goal to simplify and address any inequities or anomalies.

If LC 117 is not enacted, the LJAC recommends that the LJAC continue to pursue the study as a main study priority for the 2001-02 interim.

HJR 12 Study of a Commission on Indian Affairs

The LJAC recommends that the proposal for a Commission on Indian Affairs not be pursued further at this time.

The LJAC recommends that the committee having responsibility for state-tribal relations in the 2001-02 interim examine the possibility of expanding the Office of the Coordinator of Indian Affairs with additional staff and an increased budget.

Other Committee Recommendations

The LJAC recommends to the Legislative Council and the 57th Legislature that a separate State-Tribal Relations Interim Committee be created that would assume the LJAC's state-tribal liaison responsibilities.

The LJAC recommends to the Legislative Council (Appendix G) that the House of Representatives leadership consider a return to summarized minutes of standing committee meetings to ensure an accurate, retrievable legislative record.

CONCLUSION

As the 12 pioneers serving on the LJAC for its inaugural interim will attest and as the sheer weight of this report reflects, the Committee encountered a virtual banquet of issues when members gathered for their first meeting in September 1999. Over the ensuing months, however, the LJAC systematically consumed the various appetizers, entrees, side dishes, and desserts brought before it. Some went down better than others. Some of the spicy dishes will be burned in members' memories while other, more bland recipes may not be recalled at all. And some were so interesting that the members have recommended that they be included in next year's banquet. The dishes were many and varied, but they had one basic ingredient in common.

The concept of jurisdiction, in all of its connotations, emerges as the thread that ties together what may seem at first to be an unrelated morass of responsibilities imparted upon the LJAC.

While voluminous and intimidating in size, this review of the LJAC's work is intended to be a user-friendly digest and a guide for next interim's Committee, whether or not its duties include state-tribal relations responsibilities. Committee members realize that they have barely scratched the surface on many of the items that they only had time to touch upon this time around. Issues of statewide importance don't simply fade away once a final report is produced, and the continuity in committees allowed under Title 5, chapter 5, part 2, MCA, will help ensure that they don't fall through the cracks, particularly significant in this era of term limits where change is, as they say, as certain as death and taxes.